REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00041

In the matter between:

ALLAN KAMUTHINDI **APPELLENT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kamuthindi v S* (HC-MD-CRI-APP-CAL-2023/00041) NAHCMD 809 (8 December 2023)

Coram: USIKU J and JANUARY J
Heard: **17 November 2023**
Delivered: **8 December 2023**

Flynote: Criminal Procedure - Sentence - Attempted Murder - Appellant convicted on his own plea of guilty - Deterrence important due to the seriousness and prevalence of the offence - Custodial sentence not shockingly inappropriate in this case - Court not entitled to interfere with the sentence imposed by the court *a quo*.

Summary: The appellant was charged with attempted murder read with the Provisions of Combating of Domestic Violence Act 4 of 2003. He pleaded guilty to the charge and was accordingly convicted as charged whereafter he was sentenced to eight (8) years imprisonment of which 3 years imprisonment was suspended for 5 years on condition that he is not convicted of the offence of attempted murder,

committed during the period of suspension. Aggrieved by the sentence, the appellant filed a notice of appeal against his sentence.

Held: That the sentence imposed is appropriate and it does not induce a sense of shock.

Held further that: The court is not justified to interfere with the sentence imposed.

ORDER

Appeal against sentence is dismissed.

APEAL JUDGMENT

USIKU J (JANUARY J concurring):

Background

[1] The appellant appeared before the Regional Court sitting at Swakopmund charged with a count of attempted murder. He pleaded guilty to the charge and was accordingly convicted as charged. On 24 May 2022 the appellant was sentenced to eight (8) years' imprisonment of which three (3) years imprisonment is suspended for a period of five (5) years on condition that the appellant is not convicted with the crime of attempted murder, committed during the period of suspension.

[2] Dissatisfied with the sentence, the appellant filed a notice of appeal against his sentence.

[3] Mr Olivier appeared for the appellant whilst Ms Amukugo appeared on behalf of the respondent.

[4] The appellant's grounds of appeal against his sentence are as follows:

(i) That his guilty plea was not given sufficient weight by the court *a quo*.

(ii) That the learned magistrate placed undue weight on the interest of the public when sentencing the appellant.

(iii) That no weight was placed on the fact that the appellant was remorseful.

[5] The appellant appealed against the sentence and wishes that this court interferes with the sentence by replacing it with another sentence. His contention is that the learned magistrate misdirected herself in sentencing.

[6] The appellant contended that the sentence of five (5) years direct imprisonment is very harsh, excessive, and 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 fact that the appellant was a first offender. He had shown genuine remorse by tendering a plea of guilty without wasting the court's time. The appellant had spent some two (2) years and five (5) months awaiting the finalisation of his case in pre-trial incarceration.

[7] The respondent's counter argument is that the sentence imposed does not induce a sense of shock, therefore, this court should not interfere with the sentence imposed. It was further submitted that sentencing pre-dominantly 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[1].

[1] *S v Munyama* (SA 47/2011) [2011] NASC 13 (9 December 2011).

[8] 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 the matter of *S v Rabie*[2] 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. In *Benjamin v S* [3] the court held that:

> 'Not every misdirection entitles a court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably.'

[9] In this context, misdirection means an error committed by the trial court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the court in imposing it, exercised its discretion correctly and judiciously.

[10] The above approach has been adopted, stated and re-stated in numerous decisions by the courts in Namibia (see *S v Munyama, supra).*

[11] From a reading of the record, it is clear that the court a quo in sentencing the appellant, was alive to all the factors which must be taken into account at the stage of sentencing. There is nothing showing that the court a quo misdirected itself either on the facts or the law, or that an irregularity occurred. The court also had regard to the salutary practice that justice must be blended with a measure of mercy and that the court, guided by the circumstances of the case, may emphasise any of the factors or objectives of punishment at the expense of others *S v van Wyk.*[4] It was therefore the court's view that, given the present circumstances, there was justification in placing

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[2] *S v Rabie* 1975 4 SA 855 A at 857 D-F.
[3] *Benjamin v S* (HC – NLD – CRI – APP – CAL – 2020/00057) [2021] NAHCNLD 12 (18 February 2021).
[4] *S v van Wyk* 1993 NR 426 SC.

more emphasis on the deterrent objectives of punishment which should serve as a stern warning to others.

[12] It is evident from the court's reasons that proper consideration was given to the appellant's personal circumstances and those factors related thereto. Another consideration was the seriousness of the crime committed and the brutality and viciousness of the attack on the victim. The victim was stabbed 11 times with a dangerous weapon on vulnerable parts of the human body. Having considered all the circumstances, the court felt that it would be justified to impose a custodial sentence, part of which it suspended.

[13] With regard to a guilty plea as indication of remorse, such guilty plea was considered in the circumstances of the case. The appellant having been involved in a domestic relationship with the victim at the time, appellant had no other option than to plead guilty to the charge.

[14] There can be no doubt that the appellant was convicted of a very serious crime which is also prevalent. His personal circumstances were carefully considered as well as the interests of society when the court arrived at the sentence imposed.

[15] From the above, it therefore follows that there is no reason in law for this court to interfere with the sentence imposed by the trial court neither do we consider it to be startlingly inappropriate.

[16] As a result, the court makes the following order:

The appeal against sentence is dismissed.

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D N USIKU

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Judge

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H C JANUARY

Judge

APPEARANCES:

APPELLANT: M Olivier
Olivier Attorneys
Rehoboth

RESPONDENT: Anna Amukugo
Of the Office of the Prosecutor General,
Windhoek