

**REPUBLIC OF NAMIBIA**



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

**APPEAL JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2023/00043

In the matter between:

**MAULU FOSTA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Fosta v S* (HC-MD-CRI-APP-CAL-2023/00043) NAHCMD 155 (5 April 2024)

**Coram:** JANUARY J *et D* USIKU J

**Heard:** 5 February 2024

**Delivered:** 5 April 2024

**Flynote:** Appeal – Sentence – Contravening s 4(1)(a) read with s 1,4(2) (a),8,9,12,13 and 14 of the Controlled Wildlife Products and Trade Act 9 of 2008 for possession of controlled wildlife products to wit; 2 elephant tusks valued at N\$ 20 824.32, without a permit – It is manifestly excessive and induced a sense of shock in the mind of the court – Consequently, the court found it was entitled to interfere with the sentence – Court concluded that custodial sentence was appropriate but suspended sentence will serve the objective of deterrence.

**Summary:** The appellant was charged with contravening s 4(1)(a) read with s 1,4(2)(a),8,9,12,13 and 14 of the Controlled Wildlife Products and Trade Act 9 of 2008, for possession of controlled wildlife products to wit; 2 elephant tusks valued at N\$ 20 824.32, without a permit. He pleaded not guilty and opted to remain silent. The appellant was convicted after the state led one witness and after the appellant closed his case. He was subsequently sentenced to 10 years' direct imprisonment.

Dissatisfied with the sentence, the appellant filed his notice of appeal against the sentence. The notice of appeal was filed out of time, hence the appellant filed a condonation application. In his condonation application, the appellant attributes the delay in filing his notice of appeal on time, to the fact that he was awaiting assistance from his family for funds to engage a private lawyer, which proved futile. He, however, got assistance from another inmate, which is how he managed to file his notice of appeal.

In relation to the prospects of success, he stated briefly that there are good prospects of success because he is a first time offender and that the Controlled Wildlife Products and Trade Act gives provision for a fine of N\$15 000 or 15 years' imprisonment, but he was sentenced to 10 years' imprisonment.

The respondent raised a point *in limine* in relation to the late filing of the notice of appeal.

*Held that;* an extension of time within which to file a notice of appeal is an indulgence which will be granted on good cause shown for non-compliance and upon good prospects of success on appeal. It is therefore required, that an appellant must give a reasonable explanation for a delay to file a notice of appeal.

*Held further that;* the explanation for the delay, in these circumstances, is reasonable and acceptable and there are good prospects of success.

*The court held that;* the sentence of 10 years' imprisonment is shockingly inappropriate and too severe under the circumstances and therefore, entitles the Appeal Court to interfere in the sentence imposed by the court *a quo*. The appeal against sentence is upheld.

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### **ORDER**

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1. The application for condonation is granted.
  2. The conviction is confirmed.
  3. The sentence imposed is set aside and substituted with the following sentence; The appellant is sentenced to 6 years' imprisonment of which 2 years' are suspended for a period of 5 years', on condition that the appellant is not convicted of contravening s 4 (1)(a) read with s 1, 4(2)(a), 8, 9, 12 and 14 of the Controlled Wildlife Products and Trade Act 9 of 2008, committed during the period of suspension.
  4. The sentence is antedated to 13 April 2022.
  5. The matter is removed from the roll and regarded finalised.
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### **APEAL JUDGMENT**

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D USIKU J (JANUARY J concurring):

#### Introduction

[1] On 12 April 2022, the appellant appeared in the Katima Mulilo Magistrate's court on charges of contravening s 4 (1)(a) read with s 14(2)(a) 8, 9, 12, 12 and 14 of the Controlled Wildlife Products and Trade Act 9 of 2008 to wit 2 elephant tusks, valued at N\$20 824 with a mass of 15,95kg. The possession of which is unlawful in terms of schedule 1. After a trial, the appellant was convicted as charged and subsequently sentenced to a term of 10 years' direct imprisonment.

[2] Aggrieved by the sentence imposed, the appellant lodged an appeal against the sentence. The appellant appeared in person in the court *a quo*.

[3] Mr Siyomunji appeared for the appellant, whilst Mr Kalipi appeared for the respondent.

[4] The appellant abandoned his original notice of appeal and filed an amended notice of appeal on 30 March 2023, together with an application for condonation. The respondent raised a *point in limine*.

[5] In his notice of appeal the appellant stated, *inter alia*, as follows:

*Ad sentence*

1. That the court *a quo* erred in the law and/or on facts, in that it paid lip service to the fact that appellant is a first offender and a father of two minor children.
2. That the court *a quo* erred in the law and/or on the facts, in that it failed to give due consideration to the option of a fine to appellant and only paid lip service thereto.
3. That the court *a quo* erred in the law and/or on the facts, in that it failed to consider an alternative sentence to imprisonment.

4. That the court *a quo* erred in the law and/or on the facts, in that it failed to find that, it is a general rule of law that the court should as far as it is possible avoid sending first time offenders to prison.
5. That the court *a quo* erred in the law and/or on the facts, in that it failed to find that direct imprisonment as meted out against the appellant is not the only suitable sentence that could satisfy the objectives of punishment, namely retribution and deterrence.
6. That the court *a quo* erred in the law and/or on the facts in that it failed to find that appellant did not poach any animal nor did he permanently deprive the state or society of the said animal and only attempted to deal and/or trade in controlled wildlife products.
7. That the court *a quo* erred in the law and/or on the facts in that it failed to find that appellant did not benefit from the crime as perpetrated.
8. That the court *a quo* erred in the law and/or on the facts in that it failed to find that appellant at the age of 30 years old, was a first offender and does not have a history of crime nor does he lead a life of crime and that the attempt to deal with any controlled wildlife products as committed by appellant was an isolated case on the part of appellant.
9. That the court *a quo* erred in the law and/or on the facts in that it failed to find that appellant falls within the category of offenders who should be afforded a second chance in life and such be achieved by the imposition of an alternative punishment.
10. That the court *a quo* erred in the law and/or on the facts in that it applied the penalty clause of Act no. 6 of 2017, the Controlled Wildlife Products and Trade Act as amended. Which was not the applicable law in and/or at the time when the offence had been committed.

11. That the court *a quo* erred in the law and/or on the facts in that it failed to find that at the time the offence had been committed of which appellant has been charged and convicted the applicable law in force at the time was Act no. 9 of 2008, the Controlled Wildlife Products Act.

12. That the court *a quo* erred in the law and/or on the facts in that it failed to find that alternatively the penalty clause contained in section 4(2)(b) of Act no. 9 of 2008 as amended, which provides for a fine of N\$25 000 or a term of imprisonment not exceeding 25 years or both such fine and imprisonment, is not realistic.

13. That the court *a quo* erred in the law and/or on the facts in that it failed to find that appellant`s attempt to deal and/or trade in the controlled wildlife products as found, is said to be of the value of N\$20 824.32. Hence it would not be in the interest of justice to impose a fine of N\$25 000. In the circumstances of the matter.

*Ground 14 overlaps with ground 9*

[6] In addressing the court regarding his application for condonation, the appellant attributed the delay in lodging his notice of appeal timeously to the fact that he was waiting for his relatives to get money in order to pay for his lawyer, which did not happen. The appellant further contended that because he is a layman, he did not fully understand the processes even though the court had explained the rights after he was sentenced. He could not have understood his legal rights because he was overwhelmed after he was sentenced.

[7] In so far as the prospects of success on appeal are concerned, the appellant informed this court that he has very good prospects of success in that, he was a first time offender.

[8] He further indicated that as a first time offender he deserves a second chance and further that the court *a quo* could have considered an alternative punishment to direct imprisonment.

[9] The appellant placed his personal circumstances before the court *a quo* during mitigation of sentence. In particular, that he was a father of three minor children of which two are schooling whilst the last born is still very young. He has a wife whose parents are both deceased. He also takes care of his extended family. The appellant offered to pay a fine of N\$20 000.

[10] On the other hand, the respondent submitted that the appellant's reasons for his failure to file his appeal on time are not reasonable and further that there are no proper grounds of appeal.

[11] Counsel further submitted that the sentence is in the discretion of the court *a quo*. In this case, the court *a quo* properly exercised its judicial discretion in accordance with the judicial principles.

[12] Counsel further argued that, any sentence other than a custodial sentence would have been ineffective and inappropriate, as it will not reflect the seriousness of the crime committed. It will also send a wrong message to appellant and other offenders. He further added by saying that although being a first time offender is a mitigating factor and that a first time offender may in less serious cases be spared from receiving direct imprisonment. However, the appellant is convicted of a very serious and prevalent crime, and as such the seriousness of the crime committed will outweigh the personal circumstances of the appellant.

[13] Counsel concluded by saying that the court *a quo*, exercised its discretion judiciously and reasonably considered the crime committed, the appellant's personal circumstances and the interest of society. As a result, counsel implored the court to dismiss the appeal against sentence.

[14] It is trite that this court's power to interfere with sentence is limited. A court of appeal will only interfere if the sentence is vitiated by irregularity and misdirection, or if the sentence is one which no reasonable court would have imposed.<sup>1</sup>

[15] The appellant is a first time offender, he has a wife and three minor children whom he was taking care of. This court is also mindful of the fact that, the appellant is facing a serious and prevalent offence, however when regard is had to the value of the 2 elephant tusks which is N\$20 824.32, a sentence of 10 years' imprisonment is too harsh. When considering the recent appeal judgment of *Babi v S*<sup>2</sup>, the appellant in that case was charged with wrongful and unlawful hunting of specially protected game valued at N\$700 000, N\$267 600 and N\$167 600 respectively, he was convicted and subsequently sentenced to a fine of N\$ 370 000 or 21 years' imprisonment. Appellant appealed against both sentence and conviction. The appeal court found that, in considering the cumulative effect of the sentences, the sentences imposed were too harsh.

[16] When regard is had to the two cases and the values involved, the sentence imposed in the present case is too harsh under the circumstances.

[17] It is the appeal court's view that the court *a quo* overemphasised the seriousness of the offence at the peril of the personal circumstances of the appellant. In *Nghinaunye v State*<sup>3</sup> it was held:

'It is necessary to strike a balance which will do justice to the accused and interest of society'.

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<sup>1</sup> *S v Tjiho* 1991 NR 361 (HC).

<sup>2</sup>*Babi v S* (HC-MD-CRI-APP-CAL-2023/00046) [2023] NAHCMD 810 (8 December 2023).

<sup>3</sup>*Nghinaunye v State* (CA 62/2014) [2014] NAHCMD 372 (2 December 2014).



[18] Based on the above reasoning, I am of the view that this court should interfere with the sentence imposed by the trial court, considering the facts and circumstances of this case in particular, I find that the sentence imposed is too harsh.

[19] While I consider a custodial sentence to be appropriate, I am of the view that the sentence to be imposed by this court should be suspended. In *R v Persahd*<sup>4</sup> it was held:

‘In the ordinary way it (suspended sentence) has two beneficial effects. It prevents the offender from going to goal .... The second effect of a suspended sentence, to my mind, is a matter of very great importance. The man has the sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very deterrent effect cannot be doubted’.

[20] Considering the circumstances of the case, I am of the opinion that the sentence imposed is too excessive and that a suspended sentence will serve the objective of deterrence well.

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

1. The application for condonation is granted.
2. The conviction is confirmed.
3. The sentence imposed is set aside and substituted with the following sentence; The appellant is sentenced to 6 years’ imprisonment of which 2 years’ are suspended for a period of 5 years’, on condition that the appellant is not convicted of contravening s 4 (1)(a) read with s 1, 4(2)(a), 8, 9, 12 and 14 of the Controlled Wildlife Products and Trade Act 9 of 2008, committed during the period of suspension.

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<sup>4</sup>*R v Persahd* 1944 NPD 357.

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4. The sentence is antedated to 13 April 2022.
5. The matter is removed from the roll and regarded finalised.

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D N USIKU

Judge

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H C JANUARY

Judge

APPEARANCES:

APPELLANT: M Siyomunji  
Of Siyomunji Law Chambers,  
Windhoek

RESPONDENT: J M Kalipi  
Of the Office of the Prosecutor General,  
Windhoek