REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00062

In the matter between:

MERVIN JACOBS **APPELLENT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jacobs v S* (HC-MD-CRI-APP-CAL-2023/00062) [2024] NAHCMD 37 (9 February 2024)

Coram: D USIKU J and CHRISTIAAN J
Heard: **4 December 2023**
Delivered: **9 February 2024**

Flynote: Criminal Procedure - Sentence – Appeal against sentence – Appellant convicted of different offences at different trials – The taking of counts together for purposes of sentence can only be done in exceptional circumstances – such circumstances may be present for instance where charges are closely connected or where similar in point of time, place or circumstances.

Point in limine – Appeal filed out of time in terms of s 309 (2) of Act 51 of 1977 – Notice of appeal filed late – Explanation given not *bona fide* – No prospects of success on appeal – Sentence imposed not shockingly inappropriate – No misdirection by the court *a quo* – Application for condonation is dismissed.

Summary: The appellant was charged in the Regional Court held at Windhoek with the crime of murder with direct intent. After a full-fledged trial, the appellant was found guilty and was subsequently sentenced to 20 years' imprisonment of which 3 years were suspended for a period of five years on condition that the appellant is not convicted of the crime of murder, attempted murder or culpable homicide resulting from an assault, committed during the period of suspension.

The appellant had previously been convicted and sentenced on a different charge altogether in a different constituted court. The appellant filed a notice of appeal and also filed an application for condonation accompanied by an affidavit explaining his failure to timeously file his notice of appeal. Appellant contended that he is a layman and did not know how to draw up a notice of appeal.

Held: that the applicant bears the onus to give a reasonable and acceptable explanation for the delay and to satisfy the court that he has reasonable prospects of success on appeal.

Held further that: an application for condonation must be lodged without delay and must provide a full detailed and accurate explanation for the period of the delay including the timing of the application for condonation.

Held further that: there are no reasonable prospects of success on appeal and the application for condonation should be dismissed.

Held further: that the sentence imposed is neither shocking nor inappropriate under the circumstances of the case.

ORDER

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1. The point *in limine* is upheld.

2. The application for condonation is refused and the matter is struck from the roll and regarded as finalised.

APEAL JUDGMENT

D USIKU J (CHRISTIAAN J concurring):

Introduction

[1] The appellant was charged in the Regional court held at Windhoek with a count of murder in that upon or about 1 May 2019 and at or near Katutura in the Regional division of Windhoek, the appellant did unlawfully and intentionally kill Urlish Naruseb by hitting him with an unknown object, on the head and strangling him.

[2] The appellant pleaded guilty to the charge and a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 the (CPA) was handed in by counsel who represented the appellant in the court *a quo*, however the court *a quo* proceeded to enter a plea of not guilty in terms of s 113 of the Criminal Procedure Act 51 of 1977. Certain admissions were recorded in terms of s 220 of the CPA, whereafter the state led evidence from several witnesses and the appellant was subsequently found guilty of murder with direct intent and sentenced to 20 years' imprisonment of which 3 years were suspended for a period of 5 years' on the usual conditions.

[3] The appellant appeared in person whilst the state was represented by Ms Ndlovu.

Point *in limine*

[4] At the start of the hearing, Ms Ndlovu raised a point *in limine* in that the notice of appeal was filed outside the prescribed time as stipulated by the Magistrate Court rule 67 (1) which provides that convicted persons desiring to appeal under s 309 (1) of the CPA;

'shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law on which the appeal is based. This provision is pre-emptory.'

[5] In addition to that requirement, s 309(2) of the CPA provides that, the court of appeal can condone an applicant's failure to timeously file his notice of appeal. The applicant is required to provide a reasonable explanation which must be *bona fide* for the court to grant the applicant its indulgence. Secondly, the applicant must show the court that he enjoys reasonable prospects of success on appeal.

[6] The applicant's contention that he is a layman, is not acceptable as the rules apply to both parties equally whether represented or otherwise. The rights to appeal were fully explained to the appellant by the court *a quo* after sentence.

[7] In the notice of appeal the appellant relies on the following as his grounds of appeal:

'I (the appellant) is serving 30 years imprisonment plus 20 years imprisonment which totals 50 years and it runs consecutively, by magistrate Asino imposed.

I (appellant) therefore humbly and sincerely request to the Honourable court and magistrates to consider for both sentences to run concurrently (together).

1. In light of the Supreme Court judgment in s v Geingob and others 2018 (1) NR (SC).

2. The learned magistrate erred in law and or fact in not considering that the sentence endures a feeling of shock.'

[8] It is common cause that, when the appellant was sentenced to 20 years' imprisonment on this matter, he was already serving a sentence of 30 years on two counts of rape. He was sentenced in a different constituted court. This appeal is against the cumulative effect of the sentences.

[9] From the reading of the record, it appears that the appellant seem to frown at the court *a quo's* failure to order the sentence on the murder count to run concurrently with the sentence of 30 years on the two rape counts he had previously been convicted of.

[10] It is the duty of this court to consider whether the sentence on the murder count should be ordered to run concurrently or consecutively.

[11] It is trite that, a sentencing court is obliged to consider the cumulative effect of the sentences to be served especially if the charges are closely related, or where they arose from the same cause of action.

[12] In this case, the crime of murder and the two counts of rape to which the appellant was sentenced did not arise from the same incident neither are they closely connected. It is undesirable, and no crime should completely be ignored when sentencing by taking both counts together for the purposes of sentencing.

[13] In *S v Immerson*[1] Corbett JA explained the "difficulty" of taking counts together for the purposes of sentencing in the following way:

'In my view "difficulty" can also be caused on appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the court of appeal is to determine how the trial court assessed the seriousness of

[1] *S v Immerson* 1978 3 SA 726 A at 728 A.

each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.'

[14] It is undoubtedly so that the sentence that the court *a quo* has imposed will look heavy because of the cumulative effect when regard is had to the fact that the appellant had previously been sentenced on the two counts of rape. However those are usually the consequences a convicted person cannot escape.

[15] Furthermore, generally each crime must be punished on its own. In *S v Oxurub*[2], Parker J, had the following to say:

'It is just and proper for each crime of rape to be treated on its own right because the Namibian Constitution protects each person's basic human right, including the right to privacy and dignity, on an individual basis and not on collective basis. Each of those women should receive justice as an individual and within her own right.'

[16] I too share the same view. Concurrent sentences for unrelated offences would usually not adequately serve and may even undermine the sentencing considerations underlying the individual sentences.

[17] In *S v Kido* it was held:[3]

'The two different sentences however, cannot be ordered to run concurrently.'

[18] It is trite that an appeal court should only interfere with the sentence imposed by the trial court if the alleged misdirection was of such a nature, degree or seriousness that it shows directly or indirectly that the trial court did not exercise its discretion or exercised its discretion improperly or unreasonably. The court must therefore consider not just whether there was a misdirection, but rather whether the misdirection was of such a degree of seriousness as to demonstrate that the trial court did not exercise its sentencing discretion judiciously as held in *Arnold v S*[4].

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[2] *S v Oxurub* CC 30/2010 [2015] NHCMD 171 (28 July 2015).
[3] *S v Kido* 2014(3) NR 697 (HC).
[4] *Arnold v S* (HC-MD-CRI-APP-CAL-2018/00070) [2019] NAHCMD 279 (9 August 2019).

[19] I am satisfied that the court *a quo* exercised its discretion correctly and judiciously. Consequently, there are no prospects of success on appeal and the application for condonation is hereby refused.

[20] As a result, the following order is made:

1. The point *in limine* is upheld.
2. The application for condonation is refused and the matter is struck from the roll and regarded as finalised.

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D N USIKU

Judge

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P CHRISTIAAN

Judge

APPEARANCES:

APPELLANT: In Person
Windhoek Correctional Facility
Windhoek

RESPONDENT: Ms Ndlovu
Of the Office of the Prosecutor General,
Windhoek