



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 55/2014

In the matter between:

NEKUNDI ALWEENDO PAULUS

FIRST APPELLANT

AMADHILA EILO JONA

SECOND APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Paulus and Another v the State* (CA 55/2014) [2016] NAHCNLD 86
(17 October 2016)

Coram: JANUARY J, TOMMASI J (CONCURRING)

Heard: 12 August 2016

Released: 17 October 2016

Flynote: Criminal Procedure – Appeal against – Interference by Court of appeal – Such interference only justified where sentence vitiated by irregularity or misdirection – Sentence essentially falling within discretion of trial Court. No reasonable explanation – No prospects of success.

Summary: It is a settled rule of practice that punishment falls within the discretion of the Court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate Court ought not to interfere with the sentence imposed. The discretion may be

said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. In this appeal there is no reasonable explanation and no prospects of success on appeal. The matter is struck from the roll and considered finalized.

ORDER

The appeal is struck off the roll and considered finalized.

JUDGMENT

JANUARY J, TOMMASI J (CONCURRING)

[1] The appellants in this matter were convicted on a charge of housebreaking with intent to steal and theft on their pleas of guilty. They broke into a shebeen and stole items worth N\$19 903.00. The first appellant was convicted for items worth N\$19 873.00 as he disputed the amount and the prosecutor accepted the reduced amount while the second appellant was convicted as charged. They were both sentenced to 5 (five) years imprisonment.

[2] The appellants filed their notices of appeal late and are applying for condonation. The appellants are represented by Mr. Nsundano on instruction from the legal aid directorate and Mr. Gaweseb appears for the respondent. Mr. Gaweseb raised a point *in limine* and submitted that condonation should not be granted because the reasons for the delay are not reasonable and that there are no prospects of success in the appeal.

Mr Nsundano argued to the contrary and submitted that the reasons for the delay are acceptable and that both appellants have prospects of success in the appeal.

[3] We entertained both the application for condonation and the appeal on the merits not to delay the matter unnecessarily.

AD CONDONATION

[4] The appellants were sentenced on 06 May 2014. The first appellant filed his notice of appeal with supporting affidavit with the Prison Service on 21 August 2014 and it was received by the magistrate on 18 September 2014. He alleges in his affidavit that the procedure of writing and filing a notice of appeal was not known to him and that he was not in possession of the court record. The record reflects that the right to appeal was extensively explained to both appellants. They indicated that they understood, required no further explanation and signed the pro-forma indicating that they understood.

[5] The second appellant did not initially file a notice of appeal but this court decided to join him in this appeal and Mr. Nsundano opted to act *amicus curiae* for him. Second appellant filed a supporting affidavit on 08 August 2016. He alleges in this affidavit that he wanted to appeal soon after he was sentenced but was hampered due to the fact that he never received the case record. He applied for legal aid but it was refused whereas legal aid was granted to his co-appellant. He confirms that it was only after the intervention of this court that he is now assisted to appeal.

[6] The first appellant does not indicate what steps, if any, he took to obtain the record. Second appellant only indicates that he was once assisted to go to Outapi to obtain the record. At this occasion he could not obtain the record. His affidavit does not reflect if he took any other steps to obtain the record.

[7] A court will be guided essentially by two principles in the exercise of its discretion whether or not to grant an extension of time to appeal. Firstly, there must be sufficient and reasonable reasons why the appeal was not noted within the prescribed time limit

and secondly the court should be satisfied that the appeal has some prospects of success.

“However, the Court has a discretion in terms of Rule 27(1) of the Rules of the High Court whether to condone the noncompliance with the rules. In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the subrule is given; and where the appellant has shown that he has good prospects of success on the merits in the appeal; and where the appellant has a reasonable and acceptable explanation. In my opinion these requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of Court. In determining what is a reasonable and acceptable explanation for the failure to comply with the rules of Court, the Court makes a value judgment on the particular circumstances of the case. This of necessity will vary according to each case.”¹

[8] I fully associate myself with this approach. In view of the extensive explanation of their rights to appeal and the fact that they understood, I am not satisfied that both appellants gave a reasonable explanation for the delay to timeously file their notices to appeal.

[9] The appellants were unrepresented at the trial. Mr.Nsundano in this appeal submitted that they have reasonable prospects of success on appeal Mr.Gaweseb submitted otherwise that there are no prospects of success. The grounds of appeal are the following:

1. “That the Learned Magistrate erred in law and or on the facts in sentencing the appellants to 5 years direct imprisonment which sentence induces a sense of shock or is startling.
 - 1.1 The Learned Magistrate erred in law and or on facts in holding the view that the Appellant is not new to the courts.
 - 1.2 The learned Magistrate erred in law or facts in paying lip service to the personal circumstances of the Appellant.
 - 1.3 The Learned Magistrate erred in law or facts in overemphasizing the serious of the offence and underemphasize the personal circumstances of the Appellant.”

¹ See: S v Nakapela and Another 1997 NR 184 at 185 F-H

[10] It is trite law that a court of appeal can only interfere with sentence and the discretion exercised by the trial court in certain limited instances.

“It is, indeed, a settled rule of practice that punishment falls within the discretion of the Court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate Court ought not to interfere with the sentence imposed. This principle emerges from a chain of authorities, but for our purposes it suffices to refer only to two of them.

In *S v Rabie* 1975 (4) SA 855 (A) at 857D there occurs the following passage:

'In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) 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".'

It is explained in the same judgment that the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.

Another case in point is *S v Ivanisevic and Another* 1967 (4) SA 572 (A) in which Holmes JA stated at 575F-G that

' . . . it has more than once been pointed out that the power of a Court of appeal to ameliorate sentences is a limited one; see *Ex parte Neethling and Another* 1951 (4) SA 331 (A) at 335H; *R v Lindsay* 1957 (2) SA 235 (N); *S v De Jager and Another* 1965 (2) SA 616 (A) at 629. This is because the trial Court has a judicial discretion and the appeal is not to the discretion of the Court of appeal: on the contrary, in the latter Court the enquiry is whether it can be said that the trial Court exercised its discretion improperly.'

Another test applied by appellate Courts entertaining appeals against sentence which is said to be on the oppressive side is whether such sentence is so manifestly excessive that it induces a sense of shock in the mind of the Court. See *R v Lindsay* 1957 (2) SA 235 (N). If it does, the inference can be drawn that the discretion had not been properly exercised.”²

[11] The public prosecutor committed an irregularity by cross-examining the first appellant on a previous conviction of housebreaking whereas no previous convictions were proved in accordance with section 271 of the Criminal Procedure Act 51 of 1977 (the CPA).

[12] Section 211 of the CPA provides as follows;

“211 Evidence during criminal proceedings of previous convictions

Except where otherwise expressly provided by this Act or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he has been so convicted.” (my emphasis)

[13] The public prosecutor in the court *a quo* submitted *inter alia* as follows on sentence in relation to both accused; “Sentence of a fine will trivialize the offence. Although the State did not manage to produce Accused 2 previous convictions he was sentenced to 4 years if the State was in possession of the previous convictions it could have been referred to the regional court for sentence. Accused 2 has chosen crime as his career and has not repented.....Accused 1 is on a Warrant of Arrest on a charge of Housebreaking besides this case.” In this appeal Accused 2 is the first appellant and Accused 1 is the second appellant. The second appellant testified in mitigation and never mentioned a warrant of arrest. No evidence in relation thereto was also presented. It amounted to the prosecutor giving evidence from the bar.

² S v Ndikwetepo and Others 1993 NR 319 (SC) at 322F-323C

[14] The magistrate in his reasons states *inter alia* the following; “Both accused are not new to the courts. Accused 1 is on a warrant of arrest in another case of Housebreaking with intent to steal and theft. Accused 2 admitted that he had a previous conviction of housebreaking with intent to steal and theft to which he was sentenced to four years imprisonment. He is lucky that such previous convictions were not produced.”

[15] On perusal of the rest of the magistrate’s reasons I am convinced that the magistrate was alive to the principles of sentencing. He was guided by these principles and stated amongst others; prevention, retribution, deterrence, rehabilitation. He considered the factors of the crime, the interest of society, the accused’s personal circumstances, the seriousness of the crime and the prevalence of the crime.

[16] In my view the magistrate mentioned the fact that the appellants were not new to courts as a fact in passing, influenced by the submission of the prosecutor. I do however not find any indication that he was influenced to impose the sentence as he did. In his additional reasons, the magistrate is of the view that the sentence was lenient. I am not convinced that the magistrate misdirected himself in this regard. I also do not find that the sentence is startlingly inappropriate nor does it induce a sense of shock in the circumstances. There are no prospects of success on appeal.

[17] The application for condonation for the late filing of the notices of appeal is accordingly refused.

[18] In the result the following order is made:

The appeal is struck off the roll and considered finalized.

HC JANUARY, J

MA TOMMASI, J