

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

REASONS

Case no: HC-NLD-CRI-APP-2018/00028

In the matter between:

**ASINO FILLIPUS SHAANIKA**

**APPELLANT**

**v**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Shaanika v S* (HC-NLD-CRI-APP-CAL-2018/00028) [2019]  
NAHCNLD 36 (2 April 2019)

**Coram:** TOMMASI J and CHEDA J

**Heard on:** 13 September 2018

**Released:** 2 April 2019

**Flynote:** Criminal Procedure - Assault by threat as read with the Combating of Domestic Violence Act - Appeal against sentence - Appellant sentenced to 36 months' imprisonment of which 12 months imprisonment suspended for three years, on condition that appellant does not commit a similar crime - Sentence unduly harsh

- learned magistrate relied on facts not relevant to the offence by finding that appellant was a “child from hell” - Sentence imposed by court a *quo set* aside and substituted with 18 months imprisonment of which 6 months imprisonment is suspended for five years on condition that the appellant is not convicted of assault or assault by threat during the period of suspension.

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### ORDER

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1. The application for condonation for late noting of appeal is granted;
2. The conviction is confirmed;
3. The appeal against sentence succeeds to the extent that:  
the sentence of 36 months imprisonment of which 12 months imprisonment was suspended for three years on the usual conditions imposed by the court of a *quo* on 24 January 2018 is set aside and substituted by the following:  
  
18 months imprisonment of which six months imprisonment is suspended for five years on condition appellant is not convicted of assault or assault by threat committed during that period;
4. The sentence is ante-dated to 24 January 2018.

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### REASONS

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TOMMASI J (CHEDA J concurring):

[1] This is an appeal against sentence only.

[2] Appellant was a self-actor while respondent was represented by Advocate Nghiyoonanye. Appellant was charged with assault by threat and was duly convicted. Nothing turns on the conviction, but, he was aggrieved by the sentence imposed by the learned trial magistrate. It was alleged that on various occasions between January 2017 and January 2018 he committed the said offence. He was

thus sentenced to 36 months imprisonment of which 12 months imprisonment was suspended for three years on condition that the accused is not convicted of assault as read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) committed during that period.

[3] On 13 September 2018 this court after hearing the appellant in person and Advocate Nghiyoonanye on behalf of the respondent made the following order that:

'a) the application for condonation of the late noting of appeal is granted.

b) the conviction is confirmed;

c) the appeal against sentence succeeds to the following extent:

the sentence imposed by the court *a quo* on 24 January 2018 is set aside and substituted by the following:

18 months imprisonment of which six months imprisonment is suspended for five years on condition that appellant is not convicted of assault or assault by threat committed during that period;

d) the sentence is ante-dated to 24 January 2018.

e) reasons to follow.'

[4] The following are the reasons for the above-mentioned order.

Appellant lodged his appeal out of time and application for condonation of the said late noting of appeal. Advocate Nghiyoonanye for the respondent took issue with the said late filling of the notice of appeal as she argued that there is no reasonable explanation for the delay.

[5] In consideration of appellant's application for condonation for the late noting of an appeal, the court is constrained to evaluate the reasons for the said delay. The court, therefore, adopts a subjective approach in the said determination. However, what cannot be ignored is the fact that appellant is a lay person and in order for him to timeously note his appeal, a lot depends on the availability of the correctional services personnel.

[6] Appellant was sentenced on 24 January 2018 and filed his notice of appeal on 26 March 2018. Appellant was out of time by 29 days which is not a lot in the circumstances. In light of that, the courts, in our view, should be more lenient in their approach towards unrepresented litigants. These are lay people who, however, deserve justice and should enjoy their constitutional rights and privileges as do, the privileged, educated, economically mighty and sophisticated in our society. Married to that, is the issue of prospects of success on appeal. The sentence imposed was manifestly excessive in the circumstances. In light of the closely guarded principle of non-interference by the appeal, court except, where the trial court's judicial discretion has not been properly applied there is always room for the appeal court to interfere. In casu we opted to interfere as applicant's reasons are reasonable and his prospects of success on appeal are bright.

[7] It was alleged and proved that appellant mounted a sustained harassment of the complainant who is his mother by sending threatening messages on her cellular phone and at times personally confronting her demanding money. The complaint made reports to the police, but, this did not deter appellant at all. The conviction was, therefore, proper. It is accepted that the appellant was generally abusive to both his parents in general and to his mother in particular.

[8] Appellant submitted the following in mitigation that he:

- a) was 24 years old at the time;
- b) has one child whose mother died in an accident;
- c) owns a vehicle which was parked at his residence and there was nobody taking care of it.
- d) intended furthering his studies at a vocational training center; and
- e) accepted that his attitude towards his mother was unlawful and wrongful.

[9] The learned magistrate indicated that the appellant was "a child from hell, (sic) every parent's nightmare". He took into account that the offence was prevalent and concluded that direct imprisonment is indeed the only appropriate sentence. The learned magistrate indeed took into account the personal circumstances of the appellant and sentenced him as pointed to above.

[10] It is trite that the appellate court has limited powers to interfere with the sentence imposed by the sentencing court. It may interfere, *inter alia*:

- a) if the sentence is startlingly inappropriate;
- b) induces a sense of shock;
- c) was such that a striking disparity existed between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat in first instance; and
- d) where irrelevant factors were considered or the court *a quo* failed to consider relevant factors, see *S v Shikunga Amor* 1997(2) SACR 470 and *Schiefer v S* (SA 29-2015) [2017] NASC (12 September 2017).

[11] It is the considered view of this court that the learned magistrate correctly concluded that a custodial sentence is an appropriate sentence given the nature and the history of the appellant's offensive behavior and conduct. However the sentence is rather on the harsher side in the circumstances.

[12] It appears that the trial courts' decision was erroneously swayed by the reference to "this child from hell" which to any reasonable person is a devil where satan is perceived to reside. This is quite shocking and is likely to incur the court's wrath at the expense of simple justice. Courts should be careful not to allow emotions and feelings to cloud their judgments as this may result in injustice.

[13] In the result the following is the order of court:

1. the application for condonation for late noting of appeal is granted;
2. the conviction is confirmed;
3. the appeal against sentence succeeds to the extent that:  
the sentence of 36 months imprisonment of which 12 months imprisonment was suspended for three years on the usual conditions imposed by the court of *a quo* on 24 January 2018 is set aside and substituted by the following:

18 months imprisonment of which 6 months imprisonment is suspended for five years on condition appellant is not convicted of assault or assault by threat committed during that period;

4. The sentence is ante-dated to 24 January 2018.

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M A TOMMASI  
JUDGE

I agree

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M CHEDA  
JUDGE

## APPEARANCES:

For the Appellant:

A F Shaanika  
Oluno Correctional Facility,  
Ondangwa

For the Respondent:

M Nghiyoonanye  
Office of the Prosecutor General,  
Oshakati