



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

**JUDGMENT**

Case No: HC-NLD-CRI-APP-CAL-2019/00007

In the matter between:

**AMUKWAYA BENYAMIN**

**1<sup>ST</sup> APPELLANT**

**IYAMBO SAMUEL**

**2<sup>ND</sup> APPELLANT**

**HOFNI MALENGA**

**3<sup>RD</sup> APPELLANT**

**OSCAR AKUYELA**

**4<sup>TH</sup> APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Benyamin v S* (HC-NLD-CRI-APP-CAL-2019/00007) [2019]  
NAHCNLD 59 (11 June 2019)

**Coram:** JANUARY J and SALIONGA J

**Heard:** 23 April 2019

**Delivered:** 11 June 2019

**Fly note:** Criminal procedure — Appeal against—Sentence — Interference by court of appeal – Such interference justified where a court a quo committed serious misdirection or irregularity— No misdirection or irregularity occurred during sentence — Trial court solicited all relevant factors in mitigation before sentence — No basis for this court interfering on appeal — Consequently the appeal is dismissed.

**Summary:** The appellants have been convicted of attempted murder in that all appellants acted in common purpose by beating the complainant with sticks, palm branches and threw stones at him. The trial court had sentenced each appellant to 36 months imprisonment. Aggrieved by the sentences imposed on them, they lodged a notices of appeal against the sentences. It is a settled rule of practice that punishment falls within the discretion of the court of trial. The appeal court can only interfere with such sentence imposed if such discretion is not judicially, properly or reasonably exercised.

*Held;* that the magistrate solicited all factors necessary for consideration and no misdirection or irregularity found.

*Held further;* that there is no striking disparity between the sentences imposed by the trial court and that which would have been imposed by the court of appeal.

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**ORDER**

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The appeal is accordingly dismissed.

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## JUDGMENT

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SALIONGA J:

[1] The appellants appeared in the Okahao Magistrate's Court, on a charge of attempted murder. The basis of the charge is that the appellants acted together by beating the victim Samuel Mbango Nangobe several times with dry sticks, hoe handles, palm branches and threw stones on his body with intent to murder him.

[2] They pleaded not guilty and after the evidence had been led they were convicted. The learned magistrate sentenced each of them to 36 months' imprisonment. Despite that the matter was confirmed on review in terms of section 304 of the Criminal Procedure Act 51 of 1977, the appellants filed a notices of appeal against the sentences. At the hearing of the appeal Ms Ndilula represents the appellants and Ms Petrus appears for the State.

[3] The appellants having noted their appeals out of time, simultaneously brought an application to condone the late filing of the appeals. In considering such application, the court is guided by the approach articulated by this court in numerous case law. Usually the court will condone a failure to file such notice timeously, if the appellant gives an acceptable explanation for the delay and also establishes that there are reasonable prospects of success on appeal.

[4] In the instant case I have given a cautious thought to the reasons given by the appellants and I am satisfied that the explanations for the delay are acceptable. The late noting of the appeals and the non-compliance with rule 118(6) of the High Court rules are condoned and the parties were allowed to argue the appeal on the merits.

[5] The grounds upon which the appellants have noted their appeals are listed below as follows:

- (a) That the learned Magistrate did not consider whether a suspended sentence would be just in the circumstances of this case;
- (b) The learned Magistrate erred in law and in fact in that she under emphasised the fact that the appellants were first time offenders.

[6] Counsel for the appellants in her heads of arguments submitted that the learned magistrate misdirected herself in not considering whether there was an alternative or other adequate punishment that fits the appellants particularly because they were first time offenders. The magistrate correctly emphasised the need to deter, reform or rehabilitate. She should have considered a wholly or partly suspended sentence to ensure that offenders are deterred from future conduct but she did not. In substantiating her point counsel referred this court to *S v Brand* 1991 NR 356 (HC) where it was held that 'the reason for punishing convicted persons is to deter them and others from committing similar crimes and the purpose is to reform them if they are capable of being reformed . Society also expects that people who have done wrong will be punished that is the retributive purposes in punishment is important. Not all offences warrant a sentence of imprisonment and a first offender should not be sent to gaol if there is some other adequate punishment. Such punishment usually takes the form of a fine'. In as much as I am in agreement with the holding in the above case that first offender should not be sent to jail if there is some other adequate punishment. Sight may not be lost to our legal principles that, each case has to be considered on its own merits. In my view this quoted case is distinguishable in *casu* in that the sentences imposed in the *Brand* matter were found inappropriate and resulted in interference by the appeal or review court. This was not the case in the present matter as we were unable to find irregularities or misdirection in sentencing.

[7] She further submitted that the learned magistrate merely painted all four appellants with one brush and failed to consider the individual personal circumstances.

The law is very clear, a judgement cannot be expected to be all embracing of all issues but the court ought to have done more than it did in its judgement. The appellants had different personal circumstances and the court did not indicate which ones were taken into account and how much weight such personal circumstances was accorded to same. Therefore counsel further submitted that the sentences imposed were not consistent with the sentences in more or less the same circumstances imposed by this court and implores the appeal court to interfere with the sentences as they induce a sense of shock.

[8] Ms Petrus, counsel for the State submitted that attempted murder is a serious offence. The court a quo considered that the appellants brutally assaulted the complainant and put him through pain and humiliation. As a consequence of the appellants actions complainant was hospitalised for 12 days and left with lifelong physical scars and disability.

[9] Counsel submitted further that the trial court in sentencing the appellants, elicited all the relevant factors in mitigation that needed to be considered such as they were first offenders and their ages ranged from 20 - 25 years. In addition, counsel referred this court to the principles enunciated by Maritz J in *Nepembe v The State*, unreported case no CA 114/2003 delivered on 20.01.2005 when he said; '[No] judgement can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered....'. I accept the dictum as a good principle in law.

[10] A rule of practice in our law is punishment falls within the discretion of the trial court. As long as that discretion is judicially, properly and reasonably exercised an appellate court ought not to interfere with the sentence imposed. The principle was stated in a number of authorities but suffice to refer to *S v Tjiho* 1991 NR 361 where Levy J held that 'a court of appeal is entitled to interfere with a sentence if, the trial court misdirected itself on the facts or on the law; when an irregularity which was material occurred during the sentence proceedings; when the trial court failed to take into account material facts or

over-emphasised the importance of other facts; or when the sentence imposed is startlingly inappropriate, induces a sense of shock or there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.'

[11] I do agree with counsel for defence that the appellants were young offenders and youthfulness is a mitigating factor. However being young is not a factor to be considered in isolation it must be considered along with other factors. The appellants were all employed permanently or doing casual work and appellant two is already a father. This court, looking at the sentences sanctioned in similar cases is of the view that long custodial sentences are inevitable in attempted murder cases.

[12] In the present case, the learned magistrate did properly balance the personal circumstances of the appellants, the interest of justice as well as the interest of society. It is no doubt that the offence is serious and the appellants brutally assaulted the complainant who was hospitalized for 12 days. As a consequence of the appellants' actions, complainant suffered permanent scars and disabilities.

[13] Having heard and carefully considered the heads of arguments from both counsel and submissions made I find no misdirection or irregularities committed in sentencing. Further there is no disparity between the sentences imposed by the trial court and that which would have been imposed by the court of appeal. The sentences of 36 months imprisonment for each appellant does not justify interference on appeal.

[14] In the result;

The appeal is accordingly dismissed.

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J T SALIONGA  
JUDGE

I agree,

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H C JANUARY  
JUDGE

## APPEARANCES:

FOR THE APPELLANTS: Ms Ndilula  
Of Kadhila Amoomo Legal Practitioners, Windhoek

FOR THE RESPONDENT: Ms Petrus  
Of Office of the Prosecutor-General, Oshakati