

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI  
APPEAL JUDGMENT

“ANNEXURE 11”

<b>Case Title:</b> <i>Mbuele Katunawo v The State</i>	<b>Case No.:</b> HC-NLD-CRI-APP-CAL-2019/00091
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice January J <i>et</i> Honourable Ms. Justice Diergaardt AJ	<b>Head:</b> 11 August 2020 <b>Delivered on:</b> 3 September 2020
<b>Neutral citation:</b> <i>Katunawo v S</i> (HC-NLD-CRI-APP-CAL-2019/00091) [2020] NAHCNLD 123 (3 September 2020)	
<b>The order:</b>  1. The <i>point in limine</i> is upheld and the application for condonation is hereby dismissed;  2. The Appeal against conviction and sentence is struck from the roll.	
<b>Reasons for order:</b>	
DIERGAARDT AJ (JANUARY J concurring):  [1] The appeal is against both conviction and sentence. The Appellant was charged with contravening s 2(a) read with s 1, 2(i) and/or 2(ii), 8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971 as amended - Dealing in prohibited dependence producing drugs:	

Cannabis and or alternatively contravening s 2(b) read with s1, 2(i) and/or 2 (iv), 7,8, 10, 14 and Part 1 of the Schedule of Act 41 of 1971, as amended-Possession of prohibited dependence producing drugs: Cannabis.

[2] The Appellant pleaded not guilty on both charges. He was on trial and convicted of dealing in cannabis and sentenced to six years imprisonment of which two years were suspended for three years on condition the accused is not convicted of committing the offence of dealing in or in possession of cannabis committed during the period of suspension.

[3] The appellant is representing himself and the respondent is represented by Mr Shileka.

[4] Mr Shileka raised a *point in limine* stating that the notice of appeal was filed out of time as prescribed by the Rule 67(1) of the Magistrates court Rules. He further contends that the condonation application lacks the two legs necessary to enable the court to grant condonation applications.

[5] It is generally accepted by the Namibian courts that an application for condonation needs to satisfy two requirements in order to succeed. Firstly, there must be a reasonable explanation for the delay and secondly, the appellant must establish that there are reasonable prospects of success.<sup>1</sup>

[6] We are prepared to accept for present purposes, that the first requirement was met. The appellant although lacking particular details, has managed to offer some sort of explanation for the delay and the court accepts this explanation.

[7] The appellant does not establish the requirement of reasonable prospect of success in the appeal itself. There is no indication of any misdirection on the part of the magistrate nor does the sentence imposed in my view, strike me as disturbingly inappropriate. During the course of the argument before us, the Appellant relied almost overwhelmingly upon the

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<sup>1</sup> *Iyambo v S* (CA 25/2012) [2013] NAHCNLD 42 (2 May 2013) at para 4, 8 and 9.

facts at trial.

[8] In the case of *Mofokeng v Prokureur-Generaal* 1958 (4) SA 519 (O) at 521, where it was said that, 'even if there was an abnormal delay, the applicant would still be entitled to go into the merits of the case in an attempt to convince the court that his prospects of success are so good that, despite the delay, condonation should be granted.'

[9] It is a settled rule of practice that a court of appeal will only interfere with sentence if it has been shown that the sentencing court did not exercise its discretion judiciously and properly. Also, that the power of this court to ameliorate sentences on appeal are limited.<sup>2</sup> An instance where the court of appeal will intervene is when the sentence imposed is found to be so manifestly excessive that it induces a sense of shock in the mind of the court.<sup>3</sup>

[10] In conclusion, this court is of the view that there was no misdirection committed by the trial court in sentencing the accused which would justify interference by this court on appeal. Neither do we find a sentence of six years' imprisonment excessive, nor does it induce a sense of shock, in the circumstances of the case. Accordingly, we are not persuaded that there are prospects of success on appeal.

[11] In the result we make the following order:

1. The *point in limine* is upheld and the application for condonation is hereby dismissed;
2. The Appeal against conviction and sentence is struck from the roll.

**Judge(s) signature**

**Note to Parties;**

<sup>2</sup> *S v Ndikwetepo and Others* 1993 NR 319 (SC) at 322.

<sup>3</sup> *Kakoma v S* (CA 41/2016) [2018] NAHCMD 283 (14 September 2018) at page 6, para 11.

Diergaardt AJ	None
January J	None
<b>Counsel:</b>	
<b>Appellant</b>	<b>Respondent</b>
Mr M. Katunawo Oluno Correctional Facility, Ondangwa	Mr R. Shileka Office of the Prosecutor-General, Oshakati