REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case no: HC-NLD-CRI-APP-CAL-2020/00042

In the matter between:

JULIUS SHIMWEEFELENI TITUS	**1ST APPELLANT**
ERICKY NANGHONGA	**2ND APPELLANT**
GERSON NANGONYA	**3RD APPELLANT**

v

THE STATE	**RESPONDENT**

Neutral citation*:* *Titus v S* (HC-NLD-CRI-APP-CAL-2020/00042) [2021] NAHCNLD 50 (31 May 2021)

Coram: SMALL AJ and MUNSU AJ
Heard: **20 May 2021**
Delivered: **28 May 2021**
Released: **31 May 2021**

Flynote: Criminal Procedure-Late filing of Notice of Appeal-Application for condonation- a court may condone a late filing of a notice of appeal if an applicant provides an acceptable explanation for such late filing and if there is reasonable prospect of success on appeal

Criminal Procedure-Late filing of Notice of Appeal-Application for condonation-In the absence of an application for condonation after a late filing of a notice of appeal there is no appeal to entertain.

Summary: First and second appellant were sentenced to five years imprisonment after they pleaded guilty to and was convicted of Housebreaking with the intent to steal and Theft. The appellants broke into the house of Cornelius Fabian and stole items valued at N$26 160.00.

Both appellants filed their notices of appeal outside the prescribed 14 days. The State raised a point in limine requesting the Court to strike the matter from the roll as no applications for condonation were brought by the appellants. First appellant subsequently filed an application for condonation but counsel for second appellant elected to argue the matter without any application for condonation.

Court found that first appellant's appeal should be struck as there are no reasonable prospects of success on appeal. Second Appellant's was struck because without an application for condonation there was no appeal to consider.

ORDER

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1. The Respondent's point *in limine* is upheld.
2. The first appellant's application for condonation is refused.
3. The matter in respect of both appellants is struck from the roll and considered finalized.

REASONS

SMALL AJ (MUNSU AJ concurring):

Introduction

[1] This is an appeal against sentence by both first and second appellant after they on 17 June 2019 were sentenced to five years imprisonment by the learned magistrate H. Shilemba sitting at Eenhana Magistrate's Court after being convicted of Housebreaking with the intent to steal and Theft. The appellants broke into the house of Cornelius Fabian and stole items valued at N$26 160.00.

[2] When the Court heard the appeal against the sentence on 20 May 2021, the first appellant represented himself, Mr Shipila represented the second appellant, and Ms Petrus represented the respondent. The Court struck the appeal of the third appellant on 20 October 2020.

Point in Limine

[3] Ms Petrus raised a point in limine and argued that the appellants' notices of appeal filed on 26 July 2019 were filed outside the fourteen court days after the court a quo imposed the sentence on 17 June 2019. Rule 67(1) requires the notice of appeal to be filed with the clerk of court. The date stamp of the clerk of court, Eenhana, indicates that the notice of appeal was only filed there on 26 July 2019. The notices should have been filed there by the latest on 5 July 2019, resulting in the filing of 26 July 2019 being three weeks or 15 court days late.

[4] Perusal of the relevant part of the record indicate that both first and second appellant completed a typed notice of appeal, the one by first appellant dated 26 June 2019, against sentence and filed their respective notices of appeal with the Correctional Service Authorities on 28 June 2019. This was well before the last day of 5 July 2019 on which these notices were due to be filed with the clerk of court at Eenhana Magistrates' Court.

[5] Thus, this is once again two notices of appeal delivered to the officials of the relevant correctional facility within the prescribed period of fourteen days after sentence but only filed with the appropriate clerk of court 29 court days after the conviction and sentence and 20 court days after receiving it initially.

[6] First appellant at the hearing of this appeal handed in an affidavit dated 19 May 2021 requesting condonation averring that he filed his notice of appeal within time as was required. In his supporting affidavit, the first appellant incorrectly suggests that his delivering his notice of appeal to the prison authorities constitutes noting his appeal in terms of rule 67(1). This assumption is wrong. The notice of

appeal must be filed with the clerk of court of the relevant court within 14 court days to comply with the rule as mentioned earlier. [1]

[7] Mr Shipila's client second appellant did not file an application for condonation for the late filing of his notice of appeal. Mr Shipila submitted that an application for condonation is a request addressed to the court to excuse improper conduct. The Court essentially condone something wrong or not done at all by a party to the proceedings. In this matter, he argued, the second appellant did nothing wrong as he went as far as was possible for him to ensure that such an appeal is lodged. For that reason, the second appellant cannot be required to seek condonation for the fact that his appeal was de facto filed outside the prescribed period at the clerk of court.

[8] This novel argument on behalf of second appellant does not have to detain the Court unduly. Section 309 of the Criminal Procedure Act 51 of 1977 in terms of which the appeal was placed before this Court provides that: 'An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: Provided that the provincial division having jurisdiction may in any case extend such period.'[2] This section read with Rule 67(1)[3] provides that the notice of appeal must be filed with the clerk of court of the lower court from where the appeal originates and that an application for condonation to be brought to this court if the notice of appeal was filed out of time. Whatever the reason for the late filing was needs to be dealt with in the application for condonation.

[9] The aforesaid position was authoritatively decided in the Supreme Court by Shivute CJ with Mainga JA and Strydom AJA concurring in *S v Nakale* [4] where the Court said:

'It has become necessary now to consider also the procedure appellant had to follow to note and prosecute his appeal against conviction and sentence by the regional court. In

[1] *S v Nakale* 2011 (2) NR 599 (SC) paragraph 7

[2] Section 309(2) of the Criminal Procedure Act, 1977

[3] '67(1) A convicted person desiring to appeal under section 103 (1) of the Act, 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:…' See also *S v Miguel and Others* 2018 (4) NR 946 (HC) paragraph 4

[4] 2011 (2) NR 599 (SC) paragraph 7

terms of s 309 of the Criminal Procedure Act 51 of 1977 read with rule 67 of the Magistrates' Courts rules, appellant had to deliver a written notice of appeal to the clerk of the court within 14 days of the date of the conviction, sentence or order. In spite of the assertion on the part of the appellant that he had noted the appeal on time, it must be accepted that the written notice of appeal had not been delivered to the clerk of the court within the time limit set in the rule. As such the appellant was required to apply for condonation for the late noting of the appeal as he had indeed done. Section 309(2) of the Criminal Procedure Act empowers the High Court to condone the failure to file the notice of appeal within the prescribed time limit. Generally, a court may condone such a late filing if an applicant provides an acceptable explanation for such late filing and if there is reasonable prospect of success on appeal. S v Ngombe 1990 NR 165 (HC) at 166 (1991 (1) SACR 351 (Nm) at 352B – C); Pietersen-Diergaardt v Fischer 2008 (1) NR 307 (HC). In Pietersen-Diergaardt v Fischer supra it was explained in the headnote, in the context of a civil case, as follows:

"In considering an application for condonation for the late prosecuting of an appeal, the court will take several factors into account. These include the degree of the delay, the reasonableness of the explanation, the prospects of success and the importance of the matter. The list is not exhaustive and the court has discretion, but there should be some flexibility when exercising such discretion."'

[10] This effectively deals with the arguments by counsel for second respondent. Essentially once the accused or his legal representative filed the notice of appeal outside the prescribed fourteen-day period, an application for condonation is required before the Court of appeal can deal with the matter on appeal. Firstly, to decide whether condonation should be granted. And once condonation is granted, whether the appeal should succeed or fail. As was pointed out by this Court in *Lazarus v S* [5] there is, in the absence of an application for condonation, essentially no appeal before Court to consider.

First Appellant's Application for Condonation

[11] In considering an application for condonation for the late prosecuting of an appeal, the court will take several factors into account. The Court considers the degree of the delay, the reasonableness of the explanation, the prospects of success, and the matter's importance. The list is not exhaustive. The court has

[5] (HC-NLD-CRI-APP-CAL-2020/00043) [2020] NAHCNLD 172 (03 December 2020) paragraph 10

discretion. There, however, should be some flexibility when exercising such discretion. The merits of the appeal are fundamental and can, in appropriate cases, tip the scales to grant the application for condonation and consideration of the merits of the appeal. [6]

[12] As was indicated hereinbefore, first appellant mistakenly assumed that he filed his notice of appeal within the prescribed 14-day period required by section 309 read with rule 67(1) when he filed it with the officials of the correctional facility where he was serving his sentence. I am however prepared to accept that his explanation by implication indicates that he clearly wanted to appeal shortly after the imposition of his sentence and did everything he, as a prisoner, could do to ensure that his notice of appeal was properly lodged. He from the documentation that forms part of the record was let down by his custodians[7] who for some unexplainable reason filed his notice of appeal late with the relevant clerk of court.

[13] The reasonable explanation for the late filing is however only one part of what needs to be considered before condonation can be granted. The first appellant also had to satisfy this Court that he had reasonable prospects of success on appeal. I have carefully considered the grounds of appeal raised by the appellant and his written submissions against the background of the learned magistrate's reasons in considering whether there are reasonable prospects of success on *appeal.* [8] The presiding magistrate in her reasons stated that the personal circumstances were considered, denied that the sentence is inappropriate and requested the High Court to dismiss the appeal.

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[6] *S v Nakale* (supra) and further in paragraph 8.

[7] *Lazarus v S* (HC-NLD-CRI-APP-CAL-2020/00043) [2020] NAHCNLD 172 (03 December 2020) paragraph 11

[8] Appellant alleged the presiding magistrate failed to consider that he was a first offender, had a child of 5 months dependent upon him as the mother was unemployed and that the five years imprisonment was so unreasonable that no reasonable court would have imposed it. That the lower Court did not consider that he pleaded guilty and that a suspended or partially suspended sentence would have been appropriate in the circumstances. The first appellant reiterated these grounds in his written heads of argument.

[14] The discretion to sentence is that of the trial court. This court can only interfere if that discretion were not properly exercised and led to an unreasonable sentence or if the imposed sentence is shockingly inappropriate; or so disproportionate to any sentence that this court, sitting as a court of first instance, would have imposed.[9]

[15] What is meant by shockingly inappropriate or inducing a sense of shock was described as follows in *R v Lindsay* 1957 (2) SA 235 (N) at 235F-H and applied in *S v Ngombe* [10]

'Judging by the appeals against sentences which come before us, it would not appear to be sufficiently appreciated that the Supreme Court does not have an overriding benevolent discretion to ameliorate magistrates' sentences. The matter is governed by principle, not by ad hoc discretion. And the principle is this: If a magistrate has passed a sentence within his jurisdiction, and has not misdirected himself on the law, and has duly considered the relevant facts, the Supreme Court will not interfere unless the sentence is so severe as to be unjust. And the accepted test for determining this (at any rate in Natal) is for the appeal Court to enquire whether the sentence is so severe as to give it a sense of shock. Now "shock" is a strong word, and its requirements are not satisfied merely by a desire to interfere on sympathetic or discretionary grounds. All this is well settled, but I think it merits emphasis, for the guidance of the profession, and so that Judges may be on their guard against any tendency to substitute their discretion for that of the magistrate and to vary the sentence to one which they would have imposed if they had been sitting as a court of first instance.'

[16] A Court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did. Such a misdirection then entitles an appeal court to consider the sentence afresh.[11]

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[9] See: *S v Shapumba* 1999 NR 342 (SC); *S v Rabie* 1975 (4) SA 855 (A), *S v Tjiho* 1991 NR 361 (HC) at 362A-B and *Paulus v The State* (CA40/2015) NAHCMD 211 (11 September 2015)

[10] 1990 NR 165 (HC) 168E-G:

[11] in *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[17] Not every misdirection entitles a Court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference, that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably. In this context, misdirection means an error committed by the trial Court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially.[12]

[18] The trial Court took all the mitigating circumstances into account and committed no misdirection when sentencing the first appellant. The court a quo was further fully entitled to consider that the crime of housebreaking has reached unacceptable levels in her area of jurisdiction and now calls for sterner sentences. The sentence imposed is also by no means disturbingly inappropriate and does not create a sense of shock.

[19] There are thus no reasonable prospects of success on appeal in respect of first appellant's appeal against sentence and his application for condonation is thus refused.

[20] An accused convicted by a lower court in Namibia has a right to appeal. Such appeal includes appeals against their convictions and sentences.[13] Appeals that might have merit might be struck from the roll due to the absence of an application for condonation. It would only be fair to require the State to file any point in limine related to the lack of an application for condonation when the matter comes up for a status hearing. The Court can then issue instructions for filing such an application for condonation before such appeal is enrolled for hearing.

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[12] *S v Pillay* 1977 (4) SA 531 (A) per Trollip JA at 535D-G and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[13] In *S v Ganeb* 2001 NR 294 (HC) the High Court held that section 309(4)(a), as read with section 305, conflicts with Article 12 and Article 10 of the Constitution insofar as unrepresented accused was required to obtain a "judges' certificate" and made the following order: "Section 309(4)(a) of the Criminal Procedure Act 51 of 1977 is declared to be in conflict with the Constitution of Namibia. Parliament is required to remedy the defect by 31 October 2002. This declaration of invalidity is suspended until the defect is remedied or the above date arrives, which ever event occurs first."

[21] Albeit for different reasons the appeals of first and second appellant must both be struck from the roll.

[22] In the result, it is ordered that:

1. The Respondent's point *in limine* is upheld.
2. The first appellant's application for condonation is refused.
3. The matter in respect of both appellants is struck from the roll and considered finalized.

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D. F. SMALL

ACTING JUDGE

I agree,

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D .C. MUNSU

ACTING JUDGE

APPEARANCES

FIRST APPELLANT:	Mr J Titus Oluno Correctional Facility, Ondangwa
SECOND APPELLANT:	Mr L Shipila Directorate Legal Aid, Oshakati
RESPONDENT:	Ms S Petrus Of Office of the Prosecutor General, Oshakati