

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case Title: <i>Augustinus Panduleni Shiimi v The State</i>	Case No: HC-NLD-CRI-APP-CAL-2023/00011
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga, J et Honourable Mr Justice Kessler J	Heard on: 10 November 2023 Delivered on: 19 January 2024
Neutral citation: <i>Shiimi v S</i> (HC-NLD-CRI-APP-CAL-2023/00011) [2024] NAHCNLD 04 (19 January 2024)	
The order: <ol style="list-style-type: none">1. The Respondent's point <i>in limine</i> is upheld.2. The application for condonation is refused.3. The appeal is struck from the roll and considered finalized.	
Reasons for decision:	
KESSLAU J (SALIONGA J concurring)	
<u>Introduction</u>	

[1] The appellant was charged in the Magistrates Court of Tsumeb with the offense of theft. He pleaded guilty and after questioning in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 as amended (CPA), was convicted. The State proved two relevant previous convictions and the appellant was subsequently sentenced to 24 months imprisonment.

[2] Disgruntled with the sentence the appellant, who is a self-actor, filed a notice of appeal together with an application for condonation for the late filing thereof.

[3] The appellants' grounds of appeal are for the most part duplications and all directed at the sentence imposed. To summarize it reads that the Magistrate erred by imposing a shockingly inappropriate sentence by overemphasizing the seriousness of the offense without considering the personal circumstances of the accused. This resulted in the Magistrate failing to impose a fine.

[4] The respondent raised a point *in limine* that the notice of appeal was filed out of time and that the appellant's explanation fails to meet the requirements of reasonableness, furthermore that the appellant failed to show any prospects of success on appeal against the imposed sentence.

Point *in limine*

[5] In considering the application for the condonation of the late filing, the requirements are twofold. It consists firstly in deciding on the reasonableness of the explanation for the late filing and secondly the prospects of success on the merits. The circumstances of each case should to be taken into account and to grant or refuse condonation falls entirely within the discretion of the Court. Gibson J in *S v Nakapela and Another*¹ stated the following at para 185G-H:

'In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for

¹ 1997 NR 184 (HC).

the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits of the appeal.'

The appellant's reason for late filing

[6] The appellant in his application for condonation states that his reason for the late filing is the fact that he is a layman and was unable to draft the notice of appeal until he was assisted by a co-inmate. In the circumstances it appears to be a reasonable and acceptable explanation for the delay and therefore we will proceed to consider the second leg of the enquiry being the prospects of success.

Prospects of success

[7] During sentencing in the court *a quo* the Magistrate considered all the personal circumstances of the accused that were placed before him. The Magistrate further took into account the two previous convictions that were both for the offense of theft. These were committed only months prior to the case that was before court and in previous instances the accused were given the option to pay fines.

[8] It is well settled in our law that punishment falls predominately within the ambit and discretion of the court and may only be interfered with on appeal when is it evident that the sentencing court did not exercise its discretion judiciously in that the sentence is either vitiated by an irregularity or misdirection, or that it is disturbingly inappropriate and induces a sense of shock. Furthermore a court of appeal would be generally reluctant to erode the trial Court's discretion as such erosion could undermine the administration of justice.²

[9] The Magistrate, after considering the sentencing factors and principles, whilst being mindful that terms of imprisonment should not be lightly imposed concluded with imposing the said sentence. This court cannot find that the sentence was not appropriate

² *S v Tjiho* 1991 NR 361 (HC).

in the circumstances of this matter and therefore there is no merit in the appeal.	
[10] In the result the following orders are made:	
<ol style="list-style-type: none"> 1. The Respondent's point <i>in limine</i> is upheld. 2. The application for condonation is refused. 3. The appeal is struck from the roll and considered finalized. 	
Judge(s) signature:	Comments:
KESSLAU J	None
SALIONGA J	None
Counsel:	
APPELLANT	RESPONDENT
In person Oluno Correctional Facility	M N T Hasheela Of the Office of the Prosecutor-General, Oshakati