CA 24/97

THE STATE vs PETRUS MARUBELLA

HEARD ON: 1997.04.28

DELIVERED ON: 1997.05.02 KIRKPATRTCK A.J.

JUDGMENT

Application by State for leave to appeal against suspended sentence of 6 months imprisonment imposed on conviction of contravening section 35(2)(a) of Police Act, 1990 (wilfully hindering or obstructing member of the Namibian Police) - public prosecutor stating that fine would be appropriate accused-' with numerous previous convictions, including four of assault with intent to do grievous bodily harm - late filing of application condoned and leave to appeal granted in view of prosecutor's attitude in regard to sentence, no point in enquiring from him why he failed to appeal against sentence.

CASE NO. CA 24/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE APPLICANT

and

PETRUS MARUBELLA RESPONDENT

CORAM: KIRKPATRICK, A.J.

Heard on: 23/4/97

Delivered on: 02/05/97

JUDGMENT:

KIRXPATRICK. A..1: This is an application by the State for leave to appeal against a sentence imposed by the Magistrate for the district of Karasburg on a charge of contravening section 35(2)(a) of Act 19 of 1990 in that the accused resisted or wilfully hindered or obstructed a member of the Namibian Police in the exercise his powers or in the performance of his duties by resisting arrest.

The accused pleaded guilty to the charge, but after questioning the accused in terms of section 112 of Act No. 51 of 1977, the Magistrate, in terms of section 113, recorded a plea of not guilty and the matter was postponed for trial to 24th January, 1997.

On that date evidence was adduced ;by the State, and upon conclusion of the State's case the accused stated that he had no witnesses to call and elected to remain silent. After the state prosecutor asked for a conviction the accused stated that he was guilty and a list of some 14 previous convictions was handed in to Court and admitted by the accused. He was sentenced to a period of six months imprisonment suspended in its entirety for a period of three years subject to the usual conditions, the prosecutor having informed the Court that in his view a fine would be appropriate.

The record of the proceedings was submitted to my brother Teek, J., on 18th February 1997 for review in terms of section 302 of Act 51 of 1977, and he refused to certify the proceedings as being in accordance with justice as in his opinion the sentence imposed was totally inadequate in the light of the accused's previous convictions.

On 19th February, 1997 (i.e. after the period of 30 days after sentence allowed for noting an application for leave to appeal had already elapsed) the learned Judge's comments were referred to the Prosecutor-General, who on the 28th February, 1997 applied for an order condoning the late filing of the State's application for leave to appeal against the sentence of the Magistrate, and simultaneously applied for leave to appeal against the sentence itself. In support of the application for condonation the Prosecutor-General filed an affidavit by a member of his staff to the effect that the matter only came to the attention of the Prosecutor-General on the 26th February, 1997 when the record was

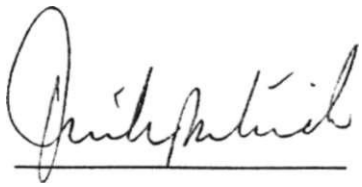
received by him from the Registrar of this Court. The deponent stated, and I accept, that no fault exists on the part of the Prosecutor-General for the delay in applying for leave to appeal.

I am aware of the comments of Hannah, J. and Mtambanengwe, J. concurring, in the Review Judgment of this Court in the matter of *The State versus I. Gawanab* CR 190/96 to the effect that without an explanation from the prosecutor in the magistrate's court, the judge hearing an application for condonation has no material before him to exercise his discretion. In the present case, however, the prosecutor at the time of sentence informed the court that he considered a fine to be appropriate, and accordingly I do not think that an explanation from him as to why he did not apply for leave to appeal against a more severe sentence than that for which he asked, would serve any purpose. Accordingly, the late filing of the application for leave to appeal is condoned.

In so far as the application itself is concerned, the accused's previous convictions date back to the year 1977 at which time he was a youth of 10 years of age if one accepts that his birth date as reflected on the Report of Conviction form is correct. Apart from various convictions for theft and housebreaking, he was convicted of assault with intent to do grievous bodily harm in 1978, again in 1986 on two occasions, and again in 1987. In 1988 he was convicted of murder with extenuating circumstances and sentenced to eight years imprisonment. In the light of this record of crimes involving violence a sentence of six months imprisonment suspended in its entirety on a conviction

for resisting a member of the police is so lenient that **I** consider that the prospects of the court of appeal imposing a more severe sentence to be good.

I accordingly grant the State leave to appeal against the sentence imposed by the Magistrate.



KIRKPATRICK. A.J.