REPUBLIC OF NAMIBIA **NOT REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

Case no: CC 12/2014

In the matter between:

FRANKLIN SAVAGE **APPELLANT**

And

THE **STATE**

RESPONDENT

Neutral citation: *Savage v State* (CC 12-2014) [2016] NAHCMD 219 (25 July 2016)

Coram: USIKU J

Heard: 24 June 2016

Delivered: 25 July 2016

Flynote: Criminal Procedure – Appeal – Application for leave to appeal – Court held that in order to succeed the applicant must satisfy the court that he has a reasonable prospect of success – In instant case Court found that the Court sitting as a trial court had considered fully and adequately the appellant's personal circumstances when sentencing the appellant – Having

done so, the appeal court dismissed the application for leave to appeal – The Applicant have failed to show that he has a reasonable prospect of success on appeal against sentence – Consequently, court dismissed the application.

Summary: Criminal Procedure – Appeal – After his trial in this court the appellant was convicted and sentenced to terms of imprisonment.

ORDER

Application for leave to appeal is dismissed.

APPLICATION FOR LEAE TO APPEAL JUDGMENT

USIKU J

[1] The appellant was sentenced on the 10 March 2016 the following counts: count 1 attempted rape 7 years imprisonment Count 4 attempted murder 10 years imprisonment, Rape on counts 5 and 6 15 years' imprisonment and counts 4 and 5 were ordered to run co currently.

[2] He now makes an application for leave to appeal against the sentence.

[3] The grounds for leave to appeal are as follows:

1. That the imprisonment terms imposed by the court in totality are shockingly inappropriate;
2. That the sentence imposed is so excessive that no reasonable man would have imposed it; further
3. That the court grossly overemphasized the seriousness of the offence at the expense of other more weighty mitigating circumstances.

[4] Mr Uirab counsel for the appellant stated that the sentence imposed by the trial judge is totally shocking and requests the honourable court to allow the sentence for the separate counts to run concurrently. He made reference the *S v Shapumba*[1], where it was referred to in *S v M* that:

> "*Where more than one offence has been committed, a Court should naturally guard against the undesirability that the cumulative effect of all the sentences does not become unreasonably onerous for the accused. This result can be avoided by ordering that some of the sentences should run concurrently, either wholly or partially. So too where it is brought to the attention of the trial Judge that the accused was busy serving a sentence which was imposed by another Court, the cumulative affect of such sentences will have to be considered in order to ensure that the total period of imprisonment is reasonable and fair and that it would not be unreasonably onerous or depressing upon the accused*."

[5] Mr Uirab further stated that the sentence is Shockingly inappropriate as no penetration was observed, comparing this crime to other serious crimes such as murder, the court ruled leniently as seen in the of cases of *S v Alfred*[2], were the accused was convicted of having killed a women whom he believed was a witch. He caused severe injuries with a stick which led to her death the day following the assault and he was only sentenced to 18years, despite the crime having involved a woman (a vulnerable member of society).

[6] Mr Lutibezi counsel for the state referred to the case of *S v van Wyk*[3], in that although each factor deserves proper consideration, it need not be given equal weight as the circumstances of a particular case may require that the one factor be emphasised at the expense of the other.

[7] In a separate case of *S v Kashawa*[4], were the accused was convicted on three counts of assault, two counts of housebreaking with intent to steal and theft, two counts of rape, pointing a firearm, two counts of attempted murder, illegal

---

[1] *S v Shapumba* (SA 4/99) [1999] NASC 5 (17 November 1999)
[2] *State v Alfred* (CC11/2013) [2016] NAHCNLD 15 (2 March 2016).
[3] *S v van Why* 1993 NR 426 HC.
[4] *S v Kashawa* (CC 9/2013) [2016] NAHCMD 79 (19 March 2016).

possession of a firearm and ammunition and sentenced to 62 years imprisonment. Mr Lutibezi alleges that 37 years is not a shocking sentence base on the *Kashawa* case (supra).

[8] In the case of *S v Simon*[5], it was stated that: 'It cannot be gainsaid that in cases of sentencing, where different and competing factors jostle for treatment, it is necessary to strike a balance which will do justice to the accused and the interests of society'. In such exercise one factor is bound to be given greater weight than the others. Furthermore the court in *Simon*[6] , relying on authorities, reiterated 'the principle that the imposition of sentence was pre-eminently a matter for the discretion of the trial court, and it is that court which can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellant court.

[9] Leave to appeal to the Appellate Division against a conviction and sentence in a Supreme Court must only be granted by the trial Judge if in the Judge's own opinion the applicant has a reasonable prospect of succeeding on appeal.[7]

[10] Additionally in *S v Nowaseb*[8] There, the full Court pointed out that:

> "... *in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view".*

[10] In *Kahiha v State* [9], The applicant failed to satisfy the court that there are reasonable prospects of success on appeal.

---

[5] *S v Simon* 2007 (2) NR 500 observed at 517
[6] Supra at 517E
[7] In S v Swanepoel 1978 (2) SA 410 at 410H.
[8] *S v Nowaseb*[8] 2007 (2) NR 640).
[9] *Kahiha v State* (CA 10/2010) [2013] NAHCMD 206 (22 July 2013).

[11] As a result the application for leave to appeal is dismissed.

DN USIKU

Judge

APPEARANCES

APPELLANT:	Mr Uirab
RESPONDENT:	Mr Lutibezi
	Of the Office of the Prosecutor-General, Windhoek