

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 34/2016

In the matter between

THE STATE

And

KLEO PASI SIKONGO KASAMBA

HIGH COURT MD REVIEW CASE NO 460/2016

Neutral citation: State v Kasamba (CR 34/2016) [2016] NAHCMD 105 (11 April 2016)

CORAM: NDAUENDAPO J et LIEBENBERG J

DELIVERED: 11 April 2016

Flynote: Criminal procedure – Sentence – Escaping from lawful custody – Accused sentenced to 3 years' imprisonment – Trial court misdirecting itself on the facts – Trial court finding aggravating factors which are not supported by the facts – Incorrect findings leading to a distorted sentence when considered in circumstances of the case – Accused prejudiced as a result thereof – Sentence reduced.

ORDER

1. The conviction is confirmed.
2. The sentence imposed is set aside and substituted with the following: Two years' imprisonment of which 6 months' imprisonment is suspended for a period of 5 years, on condition that the accused is not convicted of escaping from lawful custody, committed during the period of suspension.
3. The sentence is antedated to 26.01.2016.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] After evidence was heard the accused was convicted of the offence of escaping from lawful custody¹ and sentenced to three (3) years' imprisonment. When the matter

¹Under the common law.

came on review a query was directed to the presiding magistrate enquiring whether, in the circumstances of the case, the sentence imposed was not unduly harsh. In response the magistrate defended the sentence imposed and furnished additional reasons as to why the sentenced should be confirmed. I will return to these reasons in due course.

[2] The conviction is in order and will be confirmed.

[3] The accused, at the time of his escape from lawful custody, was a sentenced prisoner detained at Kehenge police station, pending his transfer to prison. He had been convicted of trespassing and though the sentence imposed is not known, it was likely not to have been severe in view of the offence committed. On the relevant day the accused and two fellow inmates were taken from the cells and driven to a village where they had to collect firewood required at the police station for purposes of preparing meals for the inmates. At the stage where the wood was being loaded into the police vehicle, the accused through down the axe and ran away. One police officer gave chase but the accused managed to escape. Re-enforcements were called for and after tracking down the accused, he was rearrested two hours later.

[4] As correctly pointed out by the magistrate, this is not an instance where any structure or property was damaged to facilitate the escape; he simply ran away from the police when taken into the veld to collect firewood. He was apprehended soon thereafter. The magistrate in her *ex tempore* judgment, as well as the additional reasons furnished, stressed the fact that there was a potential risk that the police officers on duty that day, could have used their firearms in order to stop the accused from running away. It was argued that it is common cause that police officers are issued with service pistols; the court clearly considered this to have been an aggravating factor. It was further said that the accused had planned his actions in advance. This is inferred from the accused's evidence when he said that he was under the impression that a convicted person

cannot be required to do any duty whilst in custody at a police station. For the aforesaid reasons, the magistrate considered a sentence of three years' imprisonment to be reasonable. I do not agree.

[5] The offence of escaping from lawful custody is indeed a serious offence justifying a custodial sentence of direct imprisonment. There is no reason why the norm should not apply to the present case. The accused, clearly disgruntled with the fact that the police officers involved came off scot free, refused to mitigate and, besides mentioning in his reasons on sentence that the accused is a first offender (excluding the conviction for trespassing), no personal particulars of the accused came on record. The accused only has himself to blame for this unfortunate situation. The court found the absence of remorse that the prevalence of the offence to be aggravating factors and decided on imposing a deterrent sentence.

[6] One aspect emphasised throughout the court's reasoning, is the possibility of the police officers having used their firearms in order to stop the accused from escaping. Inspector Sindimba was the station commander at Kahenge police station at the time and he and Warrant Officer Kaupitwa accompanied the inmates. It did not form part of his testimony (neither was it elicited by the court) that either he or his colleague at any stage resorted to the use of their firearms; if it were to be assumed that they were armed at the relevant time. The magistrate's reasoning in this regard is accordingly not supported by the facts and, to this end, the inference drawn and relied on for purposes of aggravation of sentence, constitutes a misdirection. The magistrate furthermore reasoned that the accused had pre-planned his escape. The conclusion is based on the accused's statement that he was under the impression that a convict may not be required to perform any duties whilst in detention. With deference to the learned magistrate, there is no logic in her reasoning on this point. The evidence rather tends to show that the accused had acted on the spur of the moment when the opportunity arose and he decided to escape. How could he have planned his actions in advance if he and two other inmates were unexpectedly and randomly chosen to accompany the officers

to collect firewood; or how would he have known that the opportunity would present itself during the excursion? To have considered this factor to be aggravating cannot be justified from the facts and clearly constitutes a misdirection. The cumulative effect of the misdirections committed, undoubtedly led to an increase in the sentence and which, in the end, became distorted.

[7] It is trite law that a trial court has a judicial discretion when it comes to sentencing; a discretion which must be exercised in accordance with judicial principles. A court of review or appeal will accordingly only interfere with the sentence where justice requires it and will generally 'be careful not to erode the discretion accorded to the trial Court as such erosion could undermine the administration of justice'.² In view thereof, appeal courts have, over the years, laid down guidelines which will justify such interference. The court in *Tjiho* at 366A-B laid down the following guidelines when the appeal or review court is entitled to interfere with a sentence:

Where

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentence proceedings;
- (iii) the trial court failed to take into account material facts or over-emphasised the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.'

[8] When applying these principles to the present facts, I am, for the aforesaid reasons, satisfied that the trial court misdirected itself on the facts. These were considered to be aggravating factors which prejudiced the accused at the stage of sentencing, in that it directly resulted in an increase of his sentence. In turn, this culminated in a sentence of

²*S v Tjiho* 1991 NR 361 (HC)

three years' imprisonment being imposed which, in the circumstances of the case, is startlingly inappropriate and one which this court would not have imposed, had it sat as court of first instance.

[9] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence imposed is set aside and substituted with the following: Two years' imprisonment of which 6 months' imprisonment is suspended for a period of 5 years, on condition that the accused is not convicted of escaping from lawful custody, committed during the period of suspension.
3. The sentence is antedated to 26.01.2016.

J C LIEBENBERG

JUDGE

N NDAUENDAPO
JUDGE