

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 08/2016

In the matter between

THE STATE

and

JOSEPH HARMASEN

ACCUSED NO 1

JOSEF SWARTZ

ACCUSED NO 2

BERNADUS GARISEB

ACCUSED NO 3

HIGH COURT MD REVIEW CASE NO 1761/2016

Neutral citation: State v Harmasen (CR 08/2016) [2017] NAHCMD 14 (30 January 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 30 January 2017

Flynote: Criminal procedure – Review – Sentence – Convicted of c/s 86(1)(j) of Correctional Service Act 9 of 2012 – Prisoner escaping – Penalty provision – Maximum of two years' imprisonment – Court sentenced accused to three years' imprisonment – Sentence not competent – Sentence substituted.

ORDER

1. The convictions of accused no's 1, 2 and 3 are confirmed.
2. The sentence imposed in respect of each accused is set aside and substituted with the following: Each accused sentenced to two years' imprisonment.
3. The sentence is antedated to 24.11.2016.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused were arraigned in the magistrate's court for the district of Gobabis on a charge in contravention of s 86(1)(j) of the Correctional Service Act 9 of 2012 (Offender escaping from lawful custody) and, having pleaded guilty, were convicted as charged. Each accused was sentenced to three (3) years' imprisonment. The convictions are in order and will be confirmed.

[2] When the matter came on review a query was directed to the presiding magistrate in which it was pointed out that the penalty provision set out in s 91 of Act 9 of 2012 provides for a term of imprisonment not exceeding two years imprisonment. In response thereto the magistrate concedes that she erred when imposing a sentence which exceeds the maximum punishment permitted, and proposed that the sentence be reduced accordingly.

[3] Section 91 provides as follows:

'91 Sanctions for major disciplinary offences to be imposed at trial

(1) Where a trial for a major disciplinary offence is conducted under section 88(1)(b) and the offender is found guilty of the offence, he or she is liable to-

(a) imprisonment for a period not exceeding two years;

(b)

(Emphasis provided)

[4] Under s 86 is listed offences classified as 'major disciplinary offences' which includes escaping from lawful custody (s 86(j)), the offence charged. Whereas the sentence imposed by the trial court exceeds the maximum sentence provided for in the Act by one year, it is therefore not a competent sentence and falls to be set aside.

[5] Taking into account all the facts and circumstances relevant to sentence, a sentence of two (2) years' imprisonment proposed by the magistrate seems appropriate.

[6] In the result, it is ordered:

1. The convictions of accused no's 1, 2 and 3 are confirmed.
2. The sentence imposed in respect of each accused is set aside and substituted with the following: Each accused sentenced to two years' imprisonment.
3. The sentence is antedated to 24.11.2016.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE