

**Republic of Namibia**



**HIGH COURT OF NAMIBIA MAIN DIVISION WINDHOEK  
APPEAL JUDGMENT**

**Case No:** HC-MD-CRI-APP-CAL-2017/00008

**VIDETTE MAASDORP**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral Citation:** *Maasdorp v S* (HC-MD-CRI-APP-CAL-2017/00008) [2018]  
NAHCMD 21 (12 January 2018)

**Coram:** Salionga AJ et Siboleka J

**Heard on:** 22 January 2018

**Delivered on:** 12 February 2018

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**ORDER**

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- (a) Appeal is upheld and the sentence of 24 months imprisonment is set aside.
- (b) The accused is sentenced to a fine of N\$2000 or 12 months imprisonment of which N\$1000 or 6 (six) months imprisonment is suspended for 3 years on

condition that the accused is not convicted of theft or attempted theft committed during the period of suspension.

(c) Sentence is antedated to 18 January 2017.

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## JUDGMENT

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SALIONGA AJ (SIBOLEKA J concurring)

[1] The appellant appeared in the Swakopmund Magistrate's Court on a charge of theft.

[2] He pleaded guilty and was sentenced to 24 months imprisonment and is only appealing against the sentence.

[3] The appellant filed a notice of appeal on 26 January 2017 and his grounds are as follows:

[i] That the court a quo failed to consider the personal circumstances of the Appellant.

[ii] That the learned Magistrate erred in law and / or in facts in finding that it is uncommon that it might be the first time the Appellant is caught, but not the first time she has gotten away. With due respect, this finding was speculative and unfounded in law and on the facts placed before her.

[iii] That the learned Magistrate erred in law and or facts in finding that the N\$500 the Appellant was able to pay as a fine trivialized the offence and that it would not serve as a deterrent for the Appellant or would be - offenders, if one considers the value involved.

[iv] That the learned Magistrate erred when she paid lip service to the fact that all the items were recovered and no financial loss was suffered by the complainant.

[v] That the learned Magistrate over emphasized the seriousness and prevalence of the offence in her judgement.

[vi] That the learned Magistrate erred in law and / or the facts in finding that a fine would not be appropriate and that direct imprisonment was the only appropriate sentence with deterrent effect.

[vii] That the sentence imposes a sense of shock and is startlingly inappropriate.

[4] The Magistrate in sentencing the Appellant to 24 months imprisonment took the following into consideration: The personal circumstances of the accused, the circumstances and prevalence of the offence, the interest of the community and the fact that the accused pleaded guilty. She however went on to stress that pleading guilty does not mean accused cannot be sent to jail or is entitled to a suspended sentence.

[5] Counsel for the Appellant argued that it is a cardinal principle of sentencing that when the court is considering what an appropriate and just sentence to impose, it must consider the trial namely, deterrent, prevention and retribution. He referred the court to the case of *S v Beukes* unreported High Court Judgment, Case No: CC27/2227 delivered on 9<sup>th</sup> May 2008 where Parker J at page 4 where he referred to Holmes, JA that the forth item should be added to the triads, which is a 'measure of mercy' (*S v Khumalo* 1973 (3) South Africa 697 (A)).

[6] Counsel further argued that the learned Magistrate speculated that the Appellant is a regular offender by inferring that she stole the items in order to resell them while her mitigation was that she stole the items for herself and her child. His testimony was not disputed.

[7] That she erred when she paid lip service to the fact that the items were recovered and no financial loss was suffered by the complainant. Counsel referred the court to the case of *Pieterse v State* CA102/2016 [2017] NAHCMD 91(17 March 2017) at paragraph 16.

[8] That the learned Magistrate over emphasized the seriousness and prevalence of the offence and erred in law and / or the facts in finding that a fine would not be appropriate. He referred the court to *S v Brand* 1991 NR 356 (HC) and various other cases. Based on the above, Counsel felt that the sentence imposed a sense of shock and is startling inappropriate, because cases of a similar nature have been approached differently by the Courts.

[9] In reply, counsel for the respondent argued that the Magistrate indeed considered the personal circumstances, the prevalence and seriousness of the offence and there is nothing on record to suggest that he over-emphasized the seriousness of the offence, the interest of society and the prevalence of the offence.

[10] Counsel further stated that there is nothing on record suggesting that the Magistrate found the Appellant a repeat offender and / or regular offender, as she just used her discretion in finding that sentencing the accused to a fine of N\$500 would trivialize the offence. That there is nothing in our law that confines the court to what the offender suggests as the appropriate punishment to be imposed and / or what fine he can afford to pay. According to him it is therefore not correct for the Appellant to argue that the sentence of a direct imprisonment is shockingly inappropriate and too severe under the circumstances. He requested that the appeal be dismissed.

[11] It is apparent from the record that after questioning the Appellant in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977, the court was satisfied that she intended pleading guilty as she admitted all the elements of the offence of attempted theft and convicted her accordingly.

[12] After conviction, the prosecutor rose up and submitted that the Appellant has no previous record. After the Appellant mitigated from the dock, the prosecutor addressed the court in aggravation of sentence and said:

‘Accused is not a first offender, a previous conviction dating back a few months of which she stole clothes from a shop in Swakopmund.’

[13] The prosecutor grossly misconducted himself when he placed this on record after he has already stated that she has no previous record. He was misleading and confusing the court.

[14] The trial court did not ask the prosecution to clarify the contradiction. Instead, it believed that it was not dealing with a first offender. This is apparent from page 13 and I quote verbatim:

‘It is not uncommon for persons to steal items and resell such items; it is also not uncommon that it might be the first time the accused is caught; but not the first time she had gotten away with such actions; the question at the end of the day one has to consider is whether accused is a usual offender or is it just unfortunate to her first try; she was caught.’

[15] The bottom line of the whole case is that the appellant had no previous conviction hence the prosecution said that and none was handed up to the court and to the appellant to avail her an opportunity to react to it. There was no reason for the court to doubt the fact that the Appellant was indeed a first offender.

[16] It is my considered view that the prosecutor’s erroneous submission that Appellant had a previous record, did in fact influence the Magistrate to impose a direct imprisonment of 24 months on a first offender without an option of a fine.

[17] For these reasons, the sentence cannot be allowed to stand and this court has a duty to interfere in such circumstances.

[18] In the result, I make the following order:

(a) Appeal is upheld and the sentence of 24 months imprisonment is set aside.

(b) The accused is sentenced to a fine of N\$2000 or 12 months imprisonment of which N\$1000 or 6 (six) months imprisonment is suspended for 3 years on condition that the accused is not convicted of theft or attempted theft committed during the period of suspension.

(c) Sentence is antedated to 18 January 2017.

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J T SALIONGA  
ACTING JUDGE

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A M SIBOLEKA  
JUDGE

**APPEARANCES:**

APPELLANT:

F Beukes  
Metcalf Attorneys,  
Windhoek

RESPONDENT:

S T Kanyemba  
Of office of the Prosecutor-General,  
Windhoek