

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CRI-APP-CAL 2018/00084

In the matter between:

**ERICAN CHRISTOF**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Christof v S* (HC-MD-CRI-APP-CAL 2018/00084) [2019] NAHCMD 79  
(01 April 2019)

**Coram:** LIEBENBERG, J *et* USIKU, J

**Heard:** 22 March 2019

**Delivered:** 01 April 2019

**Flynote:** Criminal Procedure – Appeal – Point *in limine* that notice of appeal does not identify specific grounds – State not prejudice as they understood the ground of appeal identified by appellant – Court to show leniency towards lay litigants – Point *in limine* dismissed.

Criminal Procedure – Appeal – Sentence – Startlingly inappropriate – Sentence rather on harsh side – Not *per se* meaning to be startlingly inappropriate – No basis for interfering on appeal – Court of view that a partly suspended sentence was to be imposed by trial court.

**Summary:** The appellant was charged with the offence of escaping from lawful custody (common law). The court *a quo* convicted the appellant and sentenced him to 3 years' imprisonment. Aggrieved by the outcome, the appellant lodged an appeal against sentence. The State raised a point *in limine*, on the ground that the appellant's notice of appeal did not identify a specific ground as contemplated by Rule 67(1) of the Magistrate's Court Rules. Appellant contends that in light of his personal circumstances the sentence imposed is too severe.

*Held*, that, the appellant being a lay person, the court of appeal should have some understanding of the appellant's circumstances and show leniency. Furthermore, in the present instance it is clear from the notice that the appeal is based on one ground only, namely, that the sentence is excessive and inappropriate.

*Held*, further that, matters involving escape from lawful custody usually attracts custodial sentences because of the seriousness of the offence.

*Held*, further that, the sentence of three years' imprisonment, though harsh, is not 'startlingly inappropriate or induces a sense of shock.'

*Held*, further that, whereas the sentence imposed is proper, but harsh, the court is of the view that the magistrate should have considered a partly suspended sentence.

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**ORDER**

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1. The appeal against sentence partly succeeds.
  2. The sentence imposed by the court *a quo* is amended to read: Three (3) years' imprisonment of which one (1) year imprisonment is suspended for a period of five 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 11 October 2018.
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**JUDGMENT**

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LIEBENBERG J (concurring USIKU J)

[1] On the 11<sup>th</sup> October 2018 the appellant appeared in the magistrate's court for the district of Karibib on a charge of escaping from lawful custody (common law). Although tendering a plea of guilty, he denied having acted with the required *mens rea*, claiming that he intended proceeding on his own to Tsumeb in order to attend pending court proceedings in which he was charged with robbery. Having raised a defence, the court noted a plea of not guilty and the matter proceeded to trial. After evidence was heard the appellant was convicted and sentenced to 3 years' imprisonment.

[2] The appellant thereafter noted an appeal within the prescribed time limit, appealing against sentence only. The appellant is unrepresented before this court.

[3] On appeal, Mr *Muhongo*, appearing for the respondent, raised a point *in limine* objecting to the notice of appeal as regards same not containing clear and specific grounds as contemplated by Rule 67(1) of the Magistrate's Court Rules. The appellant expressed his dissatisfaction with the sentence imposed in the notice of appeal in the following terms:

' . . . I am a first time offender on this count. I escaped from lawful custody on Sunday afternoon at twelve (12h00) o'clock and was arrested again on that same day (12h30). I did not even commit any crime on that day'.

[4] When considering the point raised *in limine* regard should be had to the fact that the appellant acted in person during the trial and equally without any assistance when preparing the notice of appeal. Being a lay person a court of appeal should have some understanding of the appellant's circumstances and show some leniency as regards the drafting of the notice of appeal. In this regard Van Niekerk J in *S v Ashimbange*<sup>1</sup> stated the following:

'[4] In my view the matter should be approached with some leniency bearing in mind that the appellant is a lay person drawing up a notice of appeal while serving a custodial sentence. . .'

[5] We align ourselves with the view set out in the above quote and find it applicable to the point under consideration. In the present instance it is clear from the notice that the appeal is based on one ground only, namely, that the sentence is excessive and inappropriate. Mr *Muhongo* submitted that he was able to gather from the notice that the appeal lies solely against the extent of the sentence which, in the circumstances, he conceded, would constitute a ground of appeal.

[6] The concession in my view is properly made and the point *in limine* accordingly falls to be dismissed. The parties then proceeded to argue the appeal on the merits.

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<sup>1</sup> 2014 (1) NR 242 (HC) at paras 4-5.

[7] Turning to the merits of the appeal against his sentence of 3 years' imprisonment, appellant during his oral submission argued that it was excessive in view of his personal circumstances i.e. that he is a first offender and has three minor children who need to be cared for. I pause to observe that the facts the appellant now claims to have existed at the stage of sentencing differ substantially as regards him having dependants.

[8] The magistrate in sentencing was cognisant of the appellant being a first offender, being employed as a contractor and that he was remorseful. Furthermore, the magistrate took into account that the appellant is 23 years old, single with *no children* and therefore no one would be affected if he is removed from society. On the other hand, as aggravating she considered that the appellant's actions were planned and premeditated, also that by fleeing from police custody whilst in transit to another court, he intended undermining the proper administration of justice. The court placed considerable emphasis on the interest of society and personal deterrence.

[9] It is trite that sentence predominantly lies with the trial court who has a discretion as regards sentence. This discretion is a judicial discretion which must be exercised in accordance with established principles. A court of appeal may therefore only interfere with a sentence on appeal if satisfied that (a) the trial court misdirected itself on the facts or on the law; (b) a material irregularity occurred during the sentencing proceedings; (c) the trial court failed to take into account material facts or over-emphasised the importance of the facts; or (d) the sentence imposed is startlingly inappropriate and induces a sense of shock, or that there is a strikingly disparity between the sentence imposed by the trial court and that which the court of appeal would have imposed.<sup>2</sup>

[10] Matters involving escape from lawful custody usually attracts a custodial sentence because of the seriousness of the offence.<sup>3</sup> Therefore, the question for

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<sup>2</sup> *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 639) at 366A-B).

<sup>3</sup> *S v Ashimbanga* 2014 (1) NR 242 (HC) at p 264.

determination is whether the sentence imposed by the magistrate in this instance is excessive and startlingly inappropriate.

[11] None of the first three situations as set out in *Tjiho* had been raised on appeal and therefore find no application. Although the sentence of 3 years' imprisonment is quite harsh or robust as counsel for the State rightly conceded, it does not *per se* justify interference for that reason alone on appeal. Guided by sentences imposed in other cases, this court, had it sat as court of first instance, might have imposed a different sentence than that imposed by the trial court.<sup>4</sup> However, I am not satisfied the sentence of three years' imprisonment is 'startlingly inappropriate or induces a sense of shock'.

[12] In view of the sentence being on the harsh side, the court raised with counsel for the respondent, whether this was not an instance where the trial court, in view of the appellant's personal circumstances, should have considered a partly suspended sentence. Although at first submitting that no judgment is all embracing of those facts and circumstances taken into account at sentencing, counsel, in my view correctly, conceded that, had the magistrate considered a partly suspended sentence, it would have been evident from the judgment itself, whilst it is not.

[13] As regards the objective of punishment, the court below intended to impose a deterrent sentence. To suspend part of the sentence would not erode the court's intention of personal and general deterrence and would still have the required deterrent effect on him, whilst on the other hand, show some mercy on the first offender. Whereas the sentence imposed being proper, but harsh, we are of the view that the magistrate should have considered a partly suspended sentence in the circumstances of the case and that the sentence, to this end, must be amended to give effect thereto.

[14] In the premises the following order is made:

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<sup>4</sup> The State cited two cases namely, *Awaseb v The State* CA 114/2016 (unreported judgment) where the accused was convicted of escaping from lawful custody and sentenced to 2 years' imprisonment and *S v Gariseb & 3 Other* CR 25/2015 where the accused was sentenced to 16 months' imprisonment.

1. The appeal against sentence partly succeeds.
2. The sentence imposed by the court *a quo* is amended to read: Three (3) years' imprisonment of which one (1) year imprisonment is suspended for a period of five 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 11 October 2018.

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J C LIEBENBERG  
Judge

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D USIKU  
Judge

APPEARANCES:

For the Appellant:

In person

For the Respondent:

M.H. Muhongo

Of the Office of the Prosecutor General,  
Windhoek.