REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2021/00097

In the matter between

JOHANNES ASHIPALA **APPELANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ashipala v S* (HC-MD-CRI-APP-CAL-2021/00097) [2022] NAHCMD 188 (13 April 2022)

Coram: LIEBENBERG J *et* CLAASEN J

Heard: **01 April 2022**

Delivered: **13 April 2022**

Flynote: Criminal procedure – Sentence – Escaping from lawful custody – Sentence of 3 years' imprisonment for first offender shockingly inappropriate – Norm custodial sentence – Sentence imposed out of sync with similar cases.

Summary: The appellant, a first offender, pleaded guilty and was convicted of escape from lawful custody. He was sentenced to 3 years' imprisonment.

Held – That little to no weight was accorded to the appellant's personal circumstances.

Held further – That the prevalence and seriousness of the offence was overemphasised and sentence imposed is harsh and not in sync with similar offences.
Held further – That the magistrate did not exercise her discretion judiciously.

ORDER

1. The appeal against sentence is upheld.
2. The sentence imposed is set aside and substituted with the following: Two years' imprisonment.
3. The sentence is antedated to 23.09.2021.

JUDGMENT

LIEBENBERG J (CLAASEN J Concurring)

[1] The appellant, appearing in person at the Magistrate's Court for the district of Swakopmund, was convicted of escaping from lawful custody[1] on his plea of guilty. He was sentenced to 3 years' imprisonment.

[2] He subsequently lodged an appeal against the sentence imposed by the magistrate. The grievances raised in his notice of appeal are firstly, that the magistrate failed to take his personal circumstances into account and secondly, that the sentence imposed was excessive and not blended with a measure of mercy; moreover, as he tendered a plea of guilty.

[3] The accused in mitigation stated that he is 39 years old and married with four minor children. Though unemployed at the moment, he would be able to pay a fine if he could sell one of his cattle.

[4] It is evident from the record that the magistrate's reasons for sentence are very scant. The court took the accused person's personal circumstances into account when

[1] Under the common law.

restating same. Also that the prevalence of the offence in the district of Swakopmund is aggravating, as well as the fact that the accused had been at large for 4 months before he was re-arrested. This, according to the court *a quo*, is an indication that the accused has no regard for the administration of justice. The magistrate gave no additional reasons in response to the notice of appeal.

[5] Contrary to the court *a quo*, counsel for the respondent in his written arguments overwhelmingly cited the relevant legal principles which a sentencing court generally considers when imposing a just sentence. Although counsel conceded that, such court must be mindful of the principle of uniformity in sentencing, counsel omitted to direct this court to case law relating to sentences generally imposed for similar offences. In conclusion however, counsel was of the view that, in applying the latter guidelines, no case has been made out, justifying interference by the court of appeal.

[6] It is trite law that sentencing pre-eminently falls within the discretion of the trial court; a discretion which must be exercised in accordance with judicial principles.[2] This court thus has limited power to interfere with a sentence imposed by the court below[3], and will do so only where justice requires interference. In such instance, a court of appeal will be careful not to erode the discretion accorded to the trial court.[4] In view thereof, appeal courts have, over the years laid down guidelines which justify such interference which are, among others, when.

'. . . the sentence imposed is startlingly inappropriate, induces a sense of shock, and where 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, had it sat as court of first instance. This would include sentences that are out of sync with sentences usually imposed for similar offences.'[5] (Emphasis added)

[7] Furthermore, this court in *S v Brian Stoffberg*[6] explained that:

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[2] *State v Kasamba* (CR 34/2016) [2016] NAHCMD 105 (11 April 2016).
[3] *S v Van Wyk* 1993 NR 426 (SC) page 447 J – 448 A.
[4] *S v Tjiho* 1991 NR 361 (HC)
[5] *Kamuro v The State* (HC-MD-CRI-APP-CAL 2019/00001) [2021] NAHCMD 135 (29 March 2021) at para 24.
[6] *S v Brian Stoffberg* (CA 58/2013) [2014] NAHCMD 284 (29 September 2014).

'This court will not interfere with the sentence imposed on insignificant grounds and neither would it do so simply because it would have imposed a different sentence, had it sat as court of first instance. It is only when shown that the trial court failed to exercise its sentencing discretion judiciously that the sentence will be interfered with on appeal.'

[8] Reverting to the matter at hand, it is evident that the court *a quo*, in sentencing, *mentioned* the personal circumstances of the appellant in sentencing. However, the court did not discuss the weight accorded to the totality of these factors when balanced as part of the triad.

[9] It is evident that the appellant was a first offender at the time and tendered a guilty plea. Besides the accused's personal circumstances alluded to, the courts lately lean towards a reduction in sentence where the accused pleads guilty in cases where serious crimes were committed. In circumstances where the court is satisfied that the accused's contrition is sincere and had manifested itself in a plea of guilty, this in itself should have a significant impact on the sentence to be imposed. Firstly, it must be emphasised that there is no duty on an accused person to plead guilty on any charge. But, by pleading guilty and admitting to the offence committed, the court takes the view that the accused should gain some benefit from a guilty plea without wasting time and, in suitable circumstances, is likely to receive a lesser sentence. A reduction in sentence should therefore serve as an incentive to the accused when knowing that he or she is guilty of the offence and a conviction is inevitable.

[10] In her reasons on sentence, the magistrate gave little consideration to the appellant's plea of guilty and did not pronounce herself as to what weight it should be accorded in the circumstances. The court rather emphasised the time period the appellant was outside before being rearrested, considered an aggravating factor. Although this could rightly be regarded to be in aggravation of sentence, it should still be considered against all other factors relevant to sentence and not viewed in isolation.

[11] During oral submissions I raised the question with counsel for the respondent as to whether the court *a quo* considered the principle of uniformity as regards sentences imposed in similar cases, to which he answered in the negative. The concession is proper

as the record is silent on reasons advanced as to why the court deemed it necessary to impose a sentence in *excess* of what is considered to be the norm. It seems apposite to repeat what I occasioned to say in *S v Auala (No 2)*[7] at 245B-D:

> 'The principles of individualisation and uniformity are well established in our law as regards sentencing. Suffice to say that:
>
> > "It is therefore necessary that the courts apply more or less the same guidelines regarding the imposition of sentence and that these be balanced against the principle of individualisation of the particular accused and offence." (*S v Strauss* supra).

At the same time the courts must guard against a rule that may be built up out of a series of sentences, and that it would then be irregular for a court to depart from these, as was stated in *R v Karg* supra at 236. A presiding officer has a discretion, which must be judicially exercised, when it comes to sentencing and it must always be borne in mind that each case must be considered on its own facts and circumstances.' (Emphasis provided)

[12] With regards to the offence of escaping from lawful custody, it is generally considered to be of serious nature and deserving of direct imprisonment. Judging from cases coming before this court on review, the general term of imprisonment ranges between 18 – 24 months' imprisonment for a first offender. The sentence imposed in this instance thus exceeds the norm by at least 12 months. As mentioned, no reasons or additional reasons were given which could reasonably explain why the court exercised its discretion upward and imposed a sentence in excess of what is considered by the courts to be the norm.

[13] Furthermore, in a number of similar cases the courts have found that a sentence of 3 years' imprisonment for a first offender, who pleaded guilty to escape from lawful custody, to be shockingly inappropriate.[8] More particularly, in *S v Sheehama* the court held that 'the sentence of three years imprisonment is startlingly inappropriate and warrants interference by the court of appeal'.

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[7] *S v Auala (No 2)*2008 (1) NR 240 (HC).

[8] See *Mwaamenange v S* (CA 54/2016) [2017] 120 NAHCNLD (29 December 2017), *Nghidinwa v S* (CA 26/2017) [2017] NAHCNLD 83 (15 August 2017), *S v Sheehama (*CR 22-2017) [2017] NAHCNLD 110 (2 November 2017) and *State v Kasamba* (CR 34/2016) [2016] NAHCMD 105 (11 April 2016).

[14] Van Niekerk J in *S v Ashimbanga*[9] further amplified that:

'. . . escape from lawful custody usually attracts a custodial sentence because of the seriousness of the offence. For first offenders the length of the period of imprisonment has increased slowly but surely over the years from about six months to about two years, depending on the circumstances of each case.' (Emphasis provided)

[15] Therefore, in applying the above stated principles to the present facts, the magistrate clearly overemphasized the seriousness and prevalence of the offence while giving insufficient weight to the personal and mitigating circumstances favourable to the appellant. To this end, I am satisfied that the court did not exercise its discretion judiciously, justifying the sentence ultimately imposed. This resulted in the imposition of a sentence which is unduly harsh and out of sync with sentences imposed under similar circumstances in the past.[10] Therefore, on appeal this court is entitled to interfere with the sentence imposed, given the circumstances of the case.

[16] In the result, it is ordered:

1. The appeal against sentence is upheld.
2. The sentence imposed is set aside and substituted with: Two years' imprisonment.
3. The sentence is antedated to 23.09.2021.

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J C LIEBENBERG

JUDGE

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C M CLAASEN

JUDGE

[9] *S v Ashimbanga* 2014 (1) NR 242 (HC).

[10] *Mwaamenange v S* (CA 54/2016) [2017] 120 NAHCNLD (29 December 2017) at para 8.

APPEARANCE

For The Appellant:	J Ashipala In Person
For The Respondent:	T.A.L. Gaweseb Office of the Prosecutor General, Windhoek