REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2022/00048

In the matter between:

JOSEPH DUMENI **1ST APPELLANT**

JOSE AEBEB **2ND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dumeni & Another v S (*HC-MD-CRI-APP-CAL-2020-00048) [2022] NAHCMD 680 (09 December 2022)

Coram: JANUARY J et CLAASEN J

Heard: **25 October 2022**

Delivered: **09 December 2022**

Flynote: Criminal procedure - Appeal – Sentencing – Escaping from lawful custody – First offenders – Norm custodial sentence – Sentence of 3 years imprisonment –

Shockingly inappropriate – Out of sync with similar cases – Regard to sentence precedence - Appeal upheld.

Summary: The appellants escaped from lawful custody. They pleaded guilty and was convicted of escaping from lawful *custody*. They were sentenced to 3 (three) years' imprisonment. The appeal is upheld.

Held further – The sentence is harsh and not in sync with similar offences.

Held further - The magistrate did not exercise her discretion judiciously.

ORDER

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1. The appeal against sentence is upheld
2. The sentence of the court a quo is set aside.
3. The accused are each sentenced to two years' imprisonment.
4. The sentence is antedated to 12/05/2022.

APPEAL JUDGMENT

JANUARY J (CLAASEN J concurring**):**

Introduction

[1] The appellants appeared with two co-accused in the Magistrate Court for the district of Swakopmund on a charge of escaping from lawful custody. They were convicted on 12 May 2022 with a fourth co-accused. The trial of the third accused was separated. The accused persons were unrepresented in the court a quo.

[2] The appellants were convicted upon their pleas of guilty. They were each sentenced to thirty six (36) months' imprisonment. This appeal is against their sentences. The State is opposing the appeal. The appellants remain unrepresented in this court and appeared in person. The respondent is represented by Ms. Esterhuizen.

Grounds of appeal

[3] The 1st appellant stated his grounds of appeal as follows:

' a) The first appellant do not have previous convictions to the charge of escape.

b) The sentence of three years imprisonment is not fair enough as the magistrate did not consider my personal circumstances.

c) The case was postponed till 23 May for sentencing but we were sentenced on the day not on the record.

d) I did not waste the courts time and pleaded for mercy but the court once again failed to consider our plea;

e) It was an unfair trial, injustice and a harsh sentence of 36 months imprisonment.

f) I prays that the honourable high court considers my prayer and consider reducing the sentence of 36 months imprisonment or to give an option of a fine'

[4] The 2nd appellants' grounds of appeal are stated as follows:

a) 'The appellant do not have any previous convictions "detaining" to the charge of which the State also indicated.

b) The sentence induced a sense of shock and the learned magistrate did not consider our personal circumstances, not even the fact that we together with my co-accused didn't waste the court's time.

c) The sentence imposed is shocking regards to the circumstances in which the offence was committed, the court did not consider imposing a suspended sentence nor a fine.

d) I had a total unfair trial, the ruling was made in favour of the prosecutor, who was a prosecutor of another court; while the presiding prosecutor was present.
e) Although I expressed my profound regrets and remorse and pleaded for mercy, the court or magistrate did not consider our plea.
f) We were sentenced by the Swakopmund Magistrate Court (B- Court) with my two co-accused. The presiding officer was Ms. Maria Shilongo who later failed to continue trial and another prosecutor from A – Court took over her seat while the court was in session without any preparation and the ruling went in her favour so we asked the honourable high court of Namibia to look into this matter.
g) I pray that the honourable high court consider reducing the sentence of 36 months or to give an option of fine.'

The submissions by both appellants

[5] The 1st appellant filed a notice of withdrawal of his appeal and was absent from court on 17 October 2022. The matter was then postponed to the 25 October 2022 to secure his presence and to hear the appeal. On that day the 1st appellant expressed his intention to proceed with his appeal instead.

[6] He filed written heads of argument for which he confirmed on the date of hearing and highlighted his dissatisfaction with the sentence of three years imprisonment. He submitted that the court a quo failed to sync the sentence with sentences imposed in similar cases for escaping and failed to be consistent in that regard. Further, he submitted that he is 36 years of age and that he pleaded guilty. At the time of his sentencing he was in custody for theft of a motor vehicle. He suffers from asthma. He submitted that the sentences was shockingly inappropriate and prayed for a reduction to two years imprisonment.

[7] The 2nd appellant expressed his dissatisfaction with sentence of 36 months' imprisonment by the court a quo. He submitted that he is 29 years of age, has 3 children, is a first offender who was re-apprehended three days after the escaping. He pleaded guilty to the charge and did not waste the court's time. He submitted further

that his escape did not result in any damage to property. He has no previous conviction and that the court a quo did not take into account his personal circumstances. He prayed that this court must reduce the sentence to 2 years imprisonment or that one year of the sentence is suspended for five years on conditions.

[8] The second appellant argued that the offence is not a serious one, the sentence is shocking and induces sense of shock and is not consistent with similar cases. In amplification thereof he cited *S v Hanse-Himarwa* and *Harry de Klerk v S*[1] where it was stated that it should as far as possible be avoided to send first offenders to prison. If the sentence is viewed realistically, the sentence does induce a sense of shock. That the honourable magistrate erred in law and or facts, in that she found that 'I consider the sentence to be appropriate because it does justice to the accused person as well as interest of society.'

[9] The 2nd appellant referred this court to the case of *S v Ndhlovu*, without providing full citation where that court stated as follows:

> 'The object of punishment is to hurt the offender and to hurt him sufficiently to prevent him committing a similar offence and to also warn others of the consequence of committing such offences.'

[10] Furthermore, appellant referred to *S v Mhlakaza and Another*[2] where it was held as follows:

> 'The object of sentencing is not to satisfy public opinion but to serve public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the courts duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.'

[11] He submitted that the fact that he was a first offender did not weigh heavily with the magistrate and that the court a quo misdirected itself by failing to apply applicable principles and to afford him a second chance.

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[1] *S v Hanse-Himarwa*[2] (CC 05/2018) (2019) NAHCMD 260) and *Harry de Klerk v S* case no: SA 18/2003 (08 December 2003).
[2] *S v Mhlakaza and Another*[2] 1997(1) SACR 515 (SCA) at 518E-F.

[12] The 2nd appellant also submitted that he is first offender and that the sentence imposed induces sense of shock. He found himself in the corridor and escaped through open kitchen window and nothing was broken in the process of his escape. He was caught after three days on the run when he requested his girlfriend to disclose his whereabouts to the authorities. He pleaded guilty and did not waste the court's time.

[13] He submitted that the court's mentioning of his personal circumstances was merely lip service as such was not considered. He referred to *Ashimbanga v State*[3]*:*

'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. It is so that the trial court did not make any mention of the appellant's personal circumstances when discussing sentence, but this does not mean that they were ignored.'

[14] The court in the *Ashimbaga* matter also stated the following:

'The problem for the appellant is that escape from lawful custody usually attracts a custodial sentence because of the seriousness of the offence. The appellant agreed during argument that direct imprisonment was an appropriate form of sentence, but asked that the period be reduced to 6 months. In view of the sentences usually imposed for first offenders, this suggestion is way out of line with the norm.'

[15] 'It is trite that a Court of Appeal may only interfere with a sentence if (i) the trial court misdirected itself on the facts or on the law; (ii) a material irregularity occurred during the sentencing proceedings (iii) the trial court failed to take into account material facts or over-emphasized the importance of the facts; or (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock or there is a striking disparity between the sentence imposed by the trial court and that which the Court of Appeal would have imposed.'

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[3] *Ashimbanga v State*[2] (CA 27/2012) [2012] NAHCMD 49 (2 November 2012) at par 22.

Respondent's submissions

[16] Counsel for the respondent submitted that it is not whether the sentence imposed is wrong or right, but whether the discretion was correctly exercised. It was counsel's submission that the court a quo took into account the triad principles of sentencing as reflected on page 18 of the record. Accordingly with sentencing the court considered the personal circumstances, seriousness of the offence convicted of and interest of society. These must be balanced to avoid over and or under emphasizing these principles.

[17] The learned magistrate considered the aggravating circumstances of the first appellant's reasons for escaping. His intention was to bring in contraband products including drugs and cellphones knowing that such are prohibited items in such establishment. The second appellant gave a reason for his escape. That, however, did not justify the crime. His answer was that he knew that he was being held for a big case (murder) and would not get bail. Thus he decided to escape instead.

[18] *In Goagoseb v S*[4] where that court referred to *S v Rabie* the following was held:

'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstance'.

[19] In *Tomas v The State*[5] the court agreed with the sentiments of Ndauendapo J as set out in *S v Kapuire* 2015 (2) NR 394 (HC) at page 400 paragraph 17, regarding the approach of a court of appeal concerning sentences imposed in a lower courts.

'That sentencing is pre-eminently a matter within the discretion of the court. The court of appeal will only interfere where the lower court (i) misdirected itself on the facts or on the law; (ii) if an irregularity, which was material, occurred during the sentencing proceedings; (iii) where the trial court failed to take into account material facts or overemphasized the importance of the other facts; (iv) if 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 a court of appeal (*S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR

[4] *Goagoseb v S (*HC-MD-HCMD-CRI-APP-CAL-2020/00096) [2021] NAHCMD 280 (7 June 2021) at par 11.
[5] *Tomas v The State* (CA 27/2014) [2016] NAHCNLD 54 (1 July 2016).

639) at 366A – B); (v) or that the sentence is totally out of proportion to the gravity or magnitude of the offence; (vi) or that it was in the interest of justice to alter it. (Director of Public Prosecutions, *Kwazulu-Natal v P* 2006 (3) SA 515 (SCA) (2006 (1) SACR 243; [2006] 1 All SA 446) in para 22.) A trial court's sentence would only be set aside on appeal if it appears that the trial court exercised its discretion in an improper or unreasonable manner (*S v Pieters* 1987 (3) SA 717 (A) at 727F – H).[6]'

[20] It is trite that appellate courts will not interfere with a sentence imposed by a lower court if such sentencing was exercised judiciously. In *S v Tjiho*[7] it was stated as follows:

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trail court fail to do so, the appeal court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal courts will interfere, but short of this, courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice'

[21] The 1st appellant revealed the reason for escape to obtain illegal substance into the prison facility, such amounts to an aggravating circumstance. By pleading guilty and having not damaged any property during his escape, such factors deserve to be taken into account when sentencing. These can at best be seen as mitigating factors. The 2nd appellant requested his girlfriend to inform the authorities about his whereabouts. He also did not damage any property during his escape and pleaded guilty to the charge. The same are mitigating in nature. It must be remembered that a custodial sentence is imperative considering the offence of escape from lawful custody. Previous escaping cases of a similar nature also need to be considered in these circumstances as referred to above.

[22] Having considered all the factors in mitigation as well as in aggravation of the sentence, our considered views are that the grounds of appeal have merit. The magistrate over-emphasised the seriousness of the crime, did not appropriately consider the principle of uniformity of sentences and did not exercise her discretion

[6] *S v Pieters* 1987 (3) SA 717 (A) at 727F – H).
[7] *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 693) 366A-B.

judiciously. This resulted in sentences for the appellants that are unduly harsh and out of sync with sentences imposed under similar circumstances in the past.[8] This court is therefore, in the circumstances, entitled to interfere with the sentences imposed.

[23] In the result the following order is made:

1. The appeal against sentence is upheld.
2. The sentence of the court a quo is set aside.
3. The accused are each sentenced to two years' imprisonment.
4. The sentence is antedated to 12/05/ 2022.

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H C JANUARY
Judge

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C M CLAASEN
Judge

[8] *Johannes Ashipala v S* (HC-MD-CRI-APP-CAL-2021/00097)[2022] NAHCMD 188 (13 April 2022).

APPEARANCES

1ST APPELLANT	J Dumeni
	Swakopmund Correctional Facility Swakopmund
2ND APPELLANT	J Aebeb
	Swakopmund Correctional Facility Swakopmund
RESPONDENT	K Esterhuizen
	Office of the Prosecutor General Windhoek