

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
APPEAL JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2023/00012

In the matter between:

**JOMBI CHIPOYA**

**APPELLANT**

and

**THE**

**STATE**

**RESPONDENT**

**Neutral citation:** *Chipoya v S* (HC-MD-CRI-APP-CAL-2023-00012)[2023]  
NAHCMD 557 (08 September 2023)

**Coram:** SHIVUTE J *et* CHRISTIAAN AJ

**Heard:** 07 July 2023

**Delivered:** 08 September 2023

**Flynote:** Criminal procedure – Appeal – Sentencing – Escaping from lawful custody – First offenders – Norm custodial sentence – Sentence of two years' imprisonment – Not shockingly inappropriate – In sync with similar cases – Regard to sentence precedence – Appeal dismissed.

**Summary:** The appellant escaped from lawful custody. He pleaded guilty and was convicted of escaping from lawful custody. He was sentenced to two years' imprisonment.

*Held further* – The sentence is not considered to be harsh and in sync with similar offences.

*Held further* - The magistrate exercised her discretion judiciously, and the appeal is dismissed.

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### ORDER

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The appeal is dismissed.

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### JUDGMENT

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CHRISTIAAN AJ, (SHIVUTE J, concurring):

[1] The appellant was charged with one count of resisting, obstructing or hindering a member of the police, one count of *crimen injuria* and one count of escaping from lawful custody on 24 October 2022, at or near Rundu in the district of Rundu. The appellant pleaded guilty to all three counts and was convicted of the common law offence of escaping from lawful custody in the Rundu Magistrates court. On 13 January 2023, the learned Magistrate sentenced him to 24 months' direct imprisonment.

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

[3] The grounds *inter alia* of the accused's appeal are that the term of 24 months' imprisonment is so severe that it induces a sense of shock in that it is out of sync

with sentences for similar cases; the learned Magistrate in sentencing paid no weight at all or sufficient weight to the personal circumstances of the appellant: The learned magistrate erred in that she failed to adequately take into consideration that the appellant is a first offender, he pleaded guilty and had been in custody for a period of two months; the learned magistrate erred by overemphasising the seriousness of the offence and interest of society or by failing to draw a delicate balance between the interest of the appellant and that of society in relation to the crime; the learned magistrate erred on the facts by failing to assist an unrepresented accused meaningfully to place mitigating factors before the court, for it to arrive at an appropriate sentence.

[4] The appellant in his address to the court, contended that the circumstances of the case does not justify a sentence of (24) months' imprisonment, and the learned magistrate should have suspended part of the sentence. The appellant further argued that no damage was caused to the property of the state; no injuries were sustained by any person and neither was he detained for a Schedule 1 offence.

[5] It was further argued by the appellant that the learned magistrate did not show any mercy in sentencing and failed to take into consideration his pre-trial incarceration and overemphasised the seriousness of the offence and interest of society, and thereby failed to draw a balance between the interest of the appellant and that of society.

[6] Ms Amukugo, appearing for the respondent argued to the contrary and submitted that the learned magistrate in assessing the sentence, considered the personal circumstances of the appellant, the crime committed, and the interest of society. It was further argued that the crime committed is very serious and prevalent, and the appellants' personal circumstances and mitigating factors are outweighed by the seriousness of the offence, and therefore the learned magistrate did not over emphasise the gravity of the crime thereof.

[7] It was further argued on behalf of the respondent that the sentence imposed by the learned Magistrate is in line with the norm as well as in sync with similar offences, and thus cannot be said to be inappropriate or inducing a sense of shock.

She continued her submissions and relying on the legal principles laid down in *S v Christof* (HC-MD-CRI-APP-CAL 2018/00084) [2019] NAHCMD 79, argued that escape from lawful custody usually attracts custodial sentences because of the seriousness of the offence, and therefore, the sentence of 24 months' imprisonment is in accordance with justice.

[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 to undermine 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 which has a discretion as regards to 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>1</sup>

[10] Matters involving escape from lawful custody usually attracts a custodial sentence because of the seriousness of the offence.<sup>2</sup> Therefore, the question for determination is whether the sentence imposed by the magistrate in this instance is excessive and startlingly inappropriate.

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

<sup>2</sup> *S v Ashimbanga* 2014 (1) NR 242 (HC) at p 264.

[11] After having considered the factors in mitigation and in aggravation of sentence, the sentence imposed by the learned Magistrate is in line with the norm as well as in sync with similar offences, and thus cannot be said to be inappropriate or inducing a sense of shock, it is our considered view that the grounds of appeal are unmeritorious.

[12] There was no misdirection by the Magistrate, as a deterrent sentence was called for in the circumstances. That being the case, we come to the conclusion that the appeal must fail.

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

The appeal is dismissed.

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P CHRISTIAAN  
Acting Judge

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N N SHIVUTE  
Judge

## APPEARANCES

APPELLANT: J Chipoya In person  
Correctional Facility,

RESPONDENT: A Amukugo  
Office of the Prosecutor-General, Windhoek