

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00067

In the matter between:

ELVIS TJVINDE

APPELLENT

and

THE STATE

RESPONDENT

Neutral citation: *Tjvinde v S* (HC-MD-CRI-APP-CAL-2023/00067) [2024]
NAHCMD 95 (08 March 2024)

Coram: JANUARY J *et D* USIKU J

Heard: 26 January 2024

Delivered: 8 March 2024

Flynote: Criminal Procedure – Combating of Immoral Practices Act 21 of 1980 as amended – Combating of Domestic Violence Act 4 of 2003 – Limited powers of court of appeal – Court not entitled to interfere with the sentence imposed by the court *a quo*.

Summary: The appellant was charged with contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980, as amended read with s 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003.

He pleaded guilty to the charge and was accordingly convicted, whereafter he was sentenced to thirty six (36) months imprisonment of which twelve (12) months imprisonment were suspended for 5 years on condition that he is not convicted of any offence in violation of the Combating of Immoral Practice Act 21 of 1980, committed during the period of suspension. The matter was sent on review and the reviewing judges ordered the matter to start *de novo*. The trial magistrate was directed to take into account the period of imprisonment already served by the appellant during sentencing. At the close of the trial in the court a quo, the appellant was sentenced to 24 months direct imprisonment. Aggrieved by the sentence, the appellant filed a notice of appeal against this sentence.

Held that: It is found that the trial court did not commit any misdirection when sentencing the accused.

Held further that: No reason in law exists for this court to interfere with the sentence imposed by the trial court.

ORDER

The appeal against the sentence is dismissed.

APPEAL JUDGMENT

JANUARY J (D USIKU J concurring):

Background

[1] The appellant appeared before the Omaruru Magistrates` Court, charged with one count of contravening s 14(a) of the Combating of Immoral Practices Act 21 of 1980, as amended, read with s 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003.

[2] It was alleged that on or about 3 August 2020 at about 20H00, at or near Otjinene house, Omihana Village in the district of Omaruru, the accused did wrongfully and unlawfully have or attempted to have unlawful carnal intercourse with a female child below the age of 16 years.

[3] On 11 November 2020, the appellant pleaded guilty to the charge and after being questioned in terms of s 112(1)(b) of the Criminal Procedure Act 41 of 1977 (the CPA), the court was satisfied that the appellant pleaded guilty to all the elements of the offence and accordingly convicted him. The appellant was sentenced to thirty six (36) months imprisonment of which twelve (12) months is suspended for a period of five (5) years, on condition that the appellant is not convicted of any offence in violation of the Combating of Immoral Practice Act 21 of 1980 committed during the period of suspension, on even date.

[4] Subsequent to the sentencing of the appellant in the Magistrates` Court, the matter was submitted to the High Court for review in terms of s 302(1) of the CPA.

[5] After reviewing the matter, on 15 April 2021, Liebenberg J and Shivute J delivered a judgment, in which they ordered:

‘(a) The conviction and sentence are set aside.

(b) The matter is remitted to the court *a quo* in terms of s 312(1) of Act 51 of 1977 and the learned magistrate is directed to question the accused in terms of s 112(1)(b) of the Criminal Procedure Act.

(c) When sentencing the accused, the court should take into account the sentence already served by him.’

[6] After the aforementioned judgment was delivered, the matter was remitted to the court *a quo* to start *de novo*. This time however, the accused pleaded not guilty and a trial ensued.

[7] The state called 2 witnesses, the victim and the complainant (victim`s mother), whereafter they closed their case. The appellant testified in his own defence. On 19

January 2023, the appellant was once again convicted of the charge and on 9 May 2023 he was sentenced to two (2) years imprisonment.

[8] The appellant, dissatisfied with the outcome of the court *a quo*, filed a notice of appeal against his sentence only.

[9] Mr Siyomunji appeared for the appellant whilst Ms Amukugo appeared on behalf of the respondent.

Grounds of Appeal and submissions

[10] The appellant's grounds of appeal against his sentence are as follows:

'A. The learned magistrate erred in law and/or fact by imposing a harsh sentence of Twenty-Four (24) months direct imprisonment without properly considering the personal circumstances of the Appellant and the time he had already spent in custody.'

[11] Counsel for the appellant submitted that the magistrate ought to have considered the fact that the appellant was a first time offender and that he already spent 7 months in custody, when sentencing him. Counsel emphasised the review judgment delivered by Liebenberg J and Shivute J, which ordered the court *a quo* to take the sentence already served by the appellant into account when the trial was ordered to start *de novo*. Counsel submits that this was in fact not done. Counsel submitted further that, the magistrate's sentence should have been blended with a measure of mercy, taking into consideration the circumstances outlined above. He submitted, by awarding a lesser custodial sentence and suspending part of it, alternatively awarding a fine would have demonstrated that the sentence was blended with a measure of mercy.

[12] Counsel submitted that, in the circumstances, the appellant prays that this court interferes with the sentence by replacing it with a fine of N\$1000, if one considers that the appellant had already spent seven (7) months imprisonment before the review judgment was delivered and a further five (5) months after the judgment which brought about this appeal.

[13] The respondent's counsel submitted, in opposition, that the court of appeal has limited powers to interfere with the sentencing discretion of the trial court. She

submitted further that an appeal court may only interfere when the trial court committed a material irregularity, a material misdirection on the facts or the law, where the sentence was startlingly inappropriate or induced a sense of shock, and finally if a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat as the court of first instance.

[14] It was further submitted that the sentence imposed by the trial magistrate was not shocking or startlingly inappropriate, nor did the magistrate fail to exercise his discretion judiciously. Counsel submitted that the magistrate considered the personal circumstances of the appellant as well as the time already spent in prison, as is evidenced in the record of proceedings.

Discussion

[15] It is trite that the powers of a court of appeal to interfere with a sentence imposed by the court *a quo* is limited. In the matter of *S v Rabie*¹ the court held that the court of appeal; (a) should be guided by the principle that punishment is a matter for the discretion of the trial court and (b) must be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. In *Benjamin v S*² the court held that:

‘Not every misdirection entitles a court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably.’

[16] In this context, misdirection means an error committed by the trial court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the court in imposing it, exercised its discretion correctly and judiciously.³

¹ *S v Rabie* 1975 4 SA 855 A at 857 D-F.

² *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 12 (18 February 2021).

³ *Kamuthindi v S* (HC-MD-CRI-APP-CAL-2023/00041) [2023] NAHCMD 809 (8 December 2023).

[17] It is evident from a reading of the record, that the court *a quo* considered, not only the personal circumstances of the accused, but also the time spent in prison, as was directed in the review judgment delivered by Liebenberg J and Shivute J. The court *a quo* sentenced the accused to 24 months imprisonment, as opposed to the 36 months imprisonment initially sentenced prior to the matter being reviewed. Although 12 months of the 36 months were suspended, the period of suspension nonetheless forms an integral part of the accused`s sentence, and should consequently not be regarded in isolation of the sentence conferred. In light of that finding, the appellant`s contention that the court *a quo* failed to adhere to the directions of the reviewing judges, has no merit.

[18] The sentence imposed cannot be considered as shockingly inappropriate. The court *a quo* in sentencing the appellant, had regard to his personal circumstances, including the time he spent in custody. It is accordingly found that the trial court did not commit any misdirection when sentencing the appellant.

[19] It therefore follows that no justification exists for this court to interfere with the sentence imposed by the trial court.

[20] As a result, the court makes the following order:

The appeal against the sentence is dismissed.

H C JANUARY

Judge

D N USIKU

Jud

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APPEARANCES:

APPELLANT: M Siyomunji
Of Siyomunji Law Chambers
Windhoek

RESPONDENT: Anna Amukugo
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