

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**REVIEW JUDGMENT**

Case no: CR 22/2017

**THE STATE**

**and**

**HANGULA SHEEHAMA**

**ACCUSED**

**(HIGH COURT REVIEW CASE NO. 183/2017)**

**Neutral citation:** *S v Sheehama* (CR 22-2017) [2017]NAHCNLD 110 (2 November 2017)

**Coram:** TOMMASI J *et* JANUARY J

**Delivered:** 2 November 2017

**Flynote:** Review – Sentence – Escape from lawful custody – Sentence of 3 years' imprisonment for first offender shockingly inappropriate – Wrong case law cited.

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## ORDER

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1. The conviction is confirmed;
2. The sentence imposed by the district court is set aside and substituted with the following sentence:

2 years' imprisonment of which one year's imprisonment is suspended for a period of five years on condition that the accused is not convicted of the offence of escape from lawful custody committed during the period of suspension.

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## JUDGMENT

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TOMMASI J (JANUARY J CONCURRING):

[1] This is a matter which came before me on automatic review. The accused was convicted of escape from lawful custody and sentenced to 3 years imprisonment.

[2] The accused pleaded guilty and was correctly convicted of the offence. The conviction will be confirmed. The sentence, however, for reasons which will become apparent, is not in accordance with justice.

[3] The accused escaped from custody through a hole which was cut by his inmates. He pleaded guilty and no previous convictions were proven. During mitigation he informed the court that: he is asthmatic and he cannot be confined in small enclosed places; he suffers from epilepsy; he is the eldest at home. His age as it appears from the charge sheet is 25 years. He indicated during questioning that he wanted to take his child who was sick for traditional treatment. It is not clear what the

circumstances were surrounding his re-arrest i.e. whether he reported himself or whether he was re-arrested. He however promised the court that he would never repeat the offence again.

[4] The court took into consideration the personal circumstances of the accused and the fact that he pleaded guilty. It is not apparent whether the court took into consideration the fact that the accused is a first offender. The court, correctly so, considered the fact that the accused was “on the run” for just over a year as an aggravating factor and the fact that this offence undermines the administration of justice.

[5] The court relied on *Kompeli v S* (CA 47/2016) [2016] NAHCMD 284 (26 September 2016), an unreported judgment cited by the State, which confirmed that the offence of escaping from lawful custody calls for custodial custody. The flynote of this case reads as follow: ‘Criminal law: Sentence – Housebreaking with intent to steal and theft – custodial sentence is in order’. It is evident that this case has nothing to do with escape from lawful custody. In *S v Ashimbanga 2014 (1) NR 242 (HC)* however Van Niekerk J at page 246, para 22, 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. 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.’ In that case the accused was not a first offender and the court confirmed his sentence of direct imprisonment. The court, although the principle applied is correct, would have done well to confirm the correctness of the case cited.

[6] The sentence of three years’ imprisonment in the circumstances of this case is startlingly inappropriate and it warrants this court’s interference. There was a clear misdirection by the magistrate and a delay herein would be prejudicial to the accused. The magistrate was therefore not requested to give his statement.

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

1. The conviction is confirmed;
2. The sentence imposed by the district court is set aside and substituted with the following sentence:

'2 years' imprisonment of which one year's imprisonment is suspended for a period of five years on condition that the accused is not convicted of the offence of escape from lawful custody committed during the period of suspension.'

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MA TOMMASI J

Judge

I agree

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HC JANUARY

Judge