

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

Case no: CA 54/2016

In the matter between:

SANDU MARTIN MWAAMENANGE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mwaamenange v S* (CA 54/2016) [2017] 120 NAHCNLD (29 December 2017)

Coram: TOMMASI J and JANUARY J

Heard: 2 November 2017

Delivered: 2 November 2017

Reasons Released: 29 December 2017

Flynote: Appeal – Sentence – Escape from lawful custody – Sentence shockingly inappropriate – First offender – Norm is custodial sentence – First offender - Out of sync with similar cases.

ORDER

1. The application for condonation for the late noting of the appeal is granted;
2. The appeal against sentence is upheld;
3. The sentence 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.

4. The sentence is ante-dated to 28 January 2016.
5. Reasons to follow.

JUDGEMENT

TOMMASI J (JANUARYJ concurring)

[1] The appellant was convicted of escape from lawful custody on his plea of guilty. He was sentenced to 3 years' imprisonment.

[2] The appellant filed his appeal out of time and brought an application for condonation. The court, having heard counsel and having considered the application granted condonation for the late noting of the appeal and the matter was heard on the merits. The court thereafter upheld the appeal and ordered that the sentence of 3 years' imprisonment be substituted with a sentence of 2 years' imprisonment of which one year's imprisonment is suspended for five years on condition that the appellant is not convicted of escape from lawful custody committed during the period of suspension.

The sentence was ante-dated to 28 January 2016 what follows are the reasons for the afore-mentioned order.

[3] The appellant raised 3 grounds of appeal namely:

- (a) The learned magistrate did not assist the appellant to place sufficient mitigating/personal circumstances on record;
- (b) The learned magistrate did not exercise alternatively adequately exercise his sentencing discretion judiciously in that no mitigating and/or personal circumstances of the appellant were placed on record;
- (c) The sentence is startlingly inappropriate, induces a sense of shock, in that the penalty imposed is strikingly disproportionate to the offence.

[4] The appellant, 26 years old at the time, escaped from lawful custody on 31 December 2015 and was arrested on 27 January 2016. He pleaded guilty and indicated in mitigation that he wanted the court to be lenient to him because he wanted to return to work and he has 3 children. His concern was for them to know him as a father.

[5] The learned magistrate took into consideration the appellant's mitigating circumstances and the fact that he is remorseful. The learned magistrate however considered the fact that the offence is very prevalent in the district of Eenhana and that the appellant disrespected and undermined the administration of justice. The court felt that the appellant ought to be taught a lesson that crime does not pay and that he cannot go around as he pleases. The learned magistrate determined that State suffered monetary loss for tracing the appellant and to replace the corrugated iron. The emphasis was placed on deterrence of the appellant and others.

[6] It is indeed so that this court has limited powers to interfere with a sentence imposed by the trial court.¹

[7] In this case it is evident that the personal circumstances placed before the court is indeed very scant. It has been indicated in numerous judgments of this court that the

¹ *S v Van Wyk* 1993 NR 426 (SC) page 447 J – 448 A

court has a duty to 'elicit as much as possible information from the accused to put the court in the best position to decide what sentence would be justified in the circumstances of the case.'² The result of such failure invariably results in sentences which are disproportionate to the offence and the legitimate expectations of society. The personal circumstances of an accused is vital for a balancing the various interests at play during sentencing and this court once again encourages magistrates to obtain enough information from an accused to understand the offender.

[8] The court referred counsel for the respondent to a recent review matter where this court found a similar sentence of 3 years' for a first offender who pleaded guilty to escape from lawful custody, to be shockingly inappropriate. In that cast this court referred to *S v Ashimbanga 2014 (1) NR 242 (HC)* where 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.' Counsel for the respondent conceded that the sentence imposed was harsh and inappropriate in the circumstances of this case.

[9] The court confirmed the sentence in that matter as the appellant was not a first offender. When custodial sentence is imposed as a norm, care should be taken that other factors and objectives, such as reformation are not overlooked. The accused in this case was a first offender who had shown remorse. These factors make him a good candidate for rehabilitation and suspending a portion of the imprisonment would serve as a personal deterrent whilst ameliorating the impact of the sentence.

[10] This learned magistrate clearly overemphasized the prevalence of the offence, and paid scant attention to the personal and mitigating circumstances of the appellant. This resulted in a sentence which is unduly harsh and out of sync with sentences imposed for similar offences.

[11] It was for these reasons that the court made the following order:

² *S v Simasiku* (CR 21/2017) [2017] NAHCMD 68 (10 March 2017)

1. The application for condonation for the late noting of the appeal is granted;
2. The appeal against sentence is upheld;
3. The sentence 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.
4. The sentence is ante-dated to 28 January 2016.
5. Reasons to follow.

MA Tommasi

Judge

H C January

Judge

APPEARANCE

For The Appellant:

Mr Aingura
Of Aingura Attorney
Instructed by Legal Aid

For The Respondent:

Mr Mudamburi
Office of the Prosecutor
General-Oshakati