



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 1/ 2016

In the matter between:

**PERNALIA NDAPANDULA ALFEUS**

**1<sup>ST</sup> APPELLANT**

**JOSEPH SHIKOKOLA SHOKADINJO**

**2<sup>ND</sup> APPELLANT**

**NEFENGO GERHARD MUFUULI**

**3<sup>RD</sup> APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Alfeus v S* (CA 01/2016) [2017] NAHCNLD 53 (20 June 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard on:** 25 April 2017

**Delivered:** 20 June 2017

**Flynote:** Appeal – Sentence – No reasons given by court *a quo* – Amounts to failure to exercise sentencing discretion – On appeal the sentence imposed by the court *a quo* found not to be shockingly inappropriate but interfered only to the extent that a portion thereof is suspended.

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## ORDER

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1. The sentence imposed by the court *a quo* is substituted with the following sentence:

Accused 1, 2 and 3 are sentenced to 5 years' imprisonment of which 2 years' imprisonment is suspended for a period of 5 years on condition that the accused are not convicted of robbery committed during the period of suspension.

2. The sentence is ante-dated to 5 March 2015.
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## JUDGEMENT

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TOMMASI J (JANUARY J concurring)

[1] This is an appeal against sentence imposed by the learned regional court magistrate for the district of Ondangwa. The appellants were convicted of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 51 of 1977 and they were all sentenced to 5 years' imprisonment.

[2] The first appellant's grounds of appeal are as follow:

- (a) the court overemphasized the seriousness of the offence at the expense of the appellant's personal circumstances.

- (b) the court failed to consider the fact that 1<sup>st</sup> appellant was a teenager at the time she committed the offence; that she spent a long time in custody; and had two children she was caring for; and
- (c) the sentence of 5 years imprisonment is excessive and shocking in the circumstances.

Accused 2 and 3 merely stated that the sentence of 5 years imprisonment was heavy.

[3] The record reflects that the learned magistrate merely imposed a sentence of 5 years without giving any reasons. Once confronted with the above grounds of appeal the learned magistrate responded as follows: “The accused were convicted of a very serious offence. The court had no other option but to impose a sentence of direct imprisonment. It is regrettable that no reasons were given why the court a quo held this view. Ms Nghiyoonanye, counsel for the respondent, conceded that the learned magistrate did not exercise its sentencing discretion judicially.

[4] It is trite that sentencing is entirely a matter in the discretion of the trial court and that this court may interfere where the judicial officer failed to exercise his or her sentencing discretion judicially or properly. The learned magistrate in this matter did not give any indication which factors he considered and what weight he accorded thereto. The only factor given any consideration, was the seriousness of the offence. Counsel for the State thus correctly conceded that there is no indication that the learned magistrate exercised his sentencing discretion at all.

[5] The court under the circumstances has to consider the issue of sentence afresh. Ms Nghiyoonanye submitted that despite the omission by the learned magistrate, that the sentence of 5 years imprisonment was an appropriate sentence in the circumstances of the case. She however submitted that a suspension of two years

would serve as a personal deterrent to the appellants. Mr Tjiteere, counsel for the appellants, submitted that the co-accused who had pleaded guilty was sentenced to 5 years' imprisonment of which two years were suspended and that would be an appropriate sentence given the principle that "like cases should be treated alike."

[6] The complainant was in the employ of Trusco Bank in Oshikango as a loan officer and she collected money from clients using a motorcycle. On 12 February 2008 the appellants put into motion a premeditated plan to rob the complainant. She was grabbed off her motorcycle, kicked all over her body and her bag with N\$6 347, books and a calculator were grabbed from her. She was also threatened with a knife. First appellant telephonically alerted a co-accused that the complainant was on the way and 2<sup>nd</sup> and 3<sup>r</sup> appellant assisted their co-accused to ambush the complainant and rob her in the manner described.

[7] The co-accused of the appellants pleaded guilty to the offence and testified against his co-accused after he had served his term of imprisonment. The record reflects that he was sentenced to 5 years' imprisonment of which 2 years' imprisonment was suspended. All three appellants were first offenders and they did not commit further offences during the 7 years it took to finalise the trial.

[8] The first appellant testified under oath that she is 26 years old i.e. 19 years old at the time of the commission of the offence, and not married. She is the mother of two children aged 7 and 5 years respectively. They were starting school and the father was deceased. She left her children with a lady who is blind and she herself had a problem with her sight. She furthermore also suffered paralysis of one side of her body. She called her sister who resides in Tsumeb to testify in mitigation and she largely confirms the testimony of her sister. There is no indication on the record for the "long time" she was in custody. According to the record the first appellant was granted bail and when

same was forfeited, she was warned by the court. She was detained for a short while just before she was sentenced.

[9] Second appellant testified that he was 25 years i.e. 18 years old at the time he committed the offence and not married. He is the father of one child who was 1 year and 1 month old. He testified that he assisted his uncle from time to time in his garage. He also called his nephew who confirmed his testimony.

[10] Third appellant testified that he was 25, i.e. also 18 years old at the time he committed the offence and not married. He had one child aged 2 years. He sold fruit and he in that manner provided an income for his grandmother. He also called his cousin who testified that the appellant was an orphan and that he stays with his grandparents. He testified that the appellant's grandfather was blind. The appellant according to his cousin was one of 6 children and the eldest child is employed.

[11] Robbery is a serious offence. The robbery was premeditated, violent and a dangerous weapon was used to force the unsuspecting victim into submission. She, unlike the appellants, worked for a living and her work required of her to carry cash on her person. This made her a target for criminals such as the appellants. She was vulnerable on her motorcycle and was caught unawares. An ordinary day at work became a fight for her survival. Society would expect the courts to deal harshly with perpetrators of such a violent crime.

[12] It is indeed so that the offenders were young and impressionable at the stage when they committed the offence. They are all first offenders. These factors ought to mitigate the sentence. The nature of the offence calls for a custodial sentence despite the youthfulness of the offenders. To do otherwise would send out the wrong message.

Custodial sentence for robbery is the norm and there is nothing in the personal and mitigating circumstances which persuades this court to deviate from the norm.

[13] The court is however mindful of the fact that similar sentences should be imposed when similarly placed offenders commit similar offences. The court is further of the view that the appellants are all good candidates for rehabilitation and this could be achieved by suspending a portion of the sentence.

[14] Having considered all the factors it is the considered view of this court that the sentence imposed by the court *a quo* is appropriate and that it should be interfered with only to the extent that a portion thereof be suspended.

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

1. The sentence imposed by the court *a quo* is substituted with the following sentence:

Accused 1, 2 and 3 are sentenced to 5 years' imprisonment of which 2 years' imprisonment is suspended for period of 5 years on condition that the accused are not convicted of robbery committed during the period of suspension.

2. The sentence is ante-dated to 5 March 2015.

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MA Tommasi

Judge

I agree

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H C January

Judge

APPEARANCE:

For both Appellants:

Mr Tjiteere (*Amicus curiae*)

Of Dr. Weder, Kauta & Hoveka Inc

For the respondent:

Ms Nghiyoonanye

Of Prosecutor General Office

Oshakati