



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 13/2017

In the matter between:

NANGAKU JEREMIA

1<sup>st</sup> APPELLANT

JEROBEAM AMAAMBO

2<sup>nd</sup> APPELLANT

and

THE STATE

RESPONDENT

**Neutral citation:** *Jeremia v S* (CA 13-2017) [2017] NAHCNLD 63 (06 July 2017)

**Coram:** TOMMASI, J and JANUARY, J

**Heard:** 22 June 2017

**Delivered:** 06 July 2017

**Flynote:** Criminal Procedure – Appeal – Sentence – Theft – 12 months imprisonment – No misdirection – Sentence confirmed.

**Summary:** The appellants were convicted on their pleas of guilty for theft and sentenced to 12 months imprisonment. This appeal is against sentence. The appellants allege that the sentence is too severe and that the learned magistrate committed misdirections. This court does not find any misdirection. The sentence is confirmed.

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### ORDER

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1. The appeal is dismissed;
  2. The sentence is confirmed.
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### APPEAL JUDGMENT

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**JANUARY, J (TOMMASI, J CONCURRING)**

[1] The appellants pleaded guilty to theft: 'In that on 25<sup>th</sup> January 2017 and at or near Omahenge Village in the district of Eenhana the said accused persons jointly and while acting together did wrongfully intentionally and unlawfully steal goods, the property or in the possession and control of **Victor Marais and or Vivo Energy** to wit:

**Goods stolen:**

1. Petrol	892 litres	N\$11 000
2. Diesel	199 litres	N\$
<b>Total</b>		<b>N\$11 000'</b>

[2] Both accused were sentenced to 12 months imprisonment.

[3] They were represented in the court *a quo* by Mr Thambapilai. In this court they are represented by Mr Tjiteere and the respondent is represented by Mr Tjiveze.

[4] Mr Tjiteere applied for condonation in filing his heads of argument late. Mr Tjiveze did not object to it and the appeal was argued against sentence.

[5] The grounds of appeal are as follows:

1. 'The sentence imposed by the Learned Magistrate is way too severe in that:
  - 1.1 The sentence imposed induces a sense of shock and is grossly inappropriate;
  - 1.2 the court unduly puts emphasis on the retributive aspect of sentence as the major component in arriving at the sentence which was imposed.
  - 1.3 the Court failed to exercise a certain measure of leniency towards the Appellants.
  - 1.4 The Court erred in not taking in consideration the Appellants' mitigating factors and/or personal circumstances'

[6] It is now trite law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that 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 in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.<sup>1</sup>

[7] The accused did not testify in mitigation but Mr Thambapilai addressed the court in mitigation. Appellant no. 1 had a job where he earned N\$9000 per month. He lost his job and created more problems for his family. Appellant no. 2 has responsibilities. The items stolen were recovered. Both accused are first time offenders. Appellant no. 2

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<sup>1</sup> *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

allegedly has 2 employees. Accused 1 was employed and stole from his employer. He was in a position of trust. Appellant 2 knew that his co- appellant was employed at the place where the petrol and diesel were stolen. He stood to benefit because of greed.

[8] The sentence, in my view is a bit lenient. I, however do not find it to be shockingly inappropriate nor do I find any misdirection.

[9] In the circumstances I do not interfere with it.

[10] In the result:

1. The appeal is dismissed;
2. The sentence is confirmed.

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H C JANUARY

**JUDGE**

I Agree

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M A TOMMASI

**JUDGE**

**Appearances:**

For the Appellant:

Mr Tjiteere

**Of Dr. Weder, Kauta & Hoveka Inc.**

For the Respondent:

Adv Tjiveze

**Of Office of the Prosecutor-General**