



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL REASONS

Case no: CA 45/2016

In the matter between:

SYLVESTER DUBE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Dube v S* (CA 54/2016) [2017] NAHCNLD 70 (7 July 2017)

Coram: TOMMASI, J and JANUARY, J

Heard: 20 October 2016

Released: 7 July 2017

Flynote: Criminal Procedure – Appeal – Sentence – additional reasons - failure by magistrate to indicate whether or not he took mitigating factors into consideration lead court to conclude that same was not considered – amount to failure by magistrate to properly apply its judicial discretion in respect of the sentence.

ORDER

1. The Appeal against the sentence is upheld;
2. The sentence imposed by the district court is set aside and substituted with the following sentence:
 - 2.1 The accused is sentenced to 7 months' and 26 days imprisonment, (i.e. time served) and the accused is to be released forthwith;
3. The sentence is ante-dated to 24 February 2016;
4. Reasons to follow.

JUDGMENT

TOMMASI, J (JANUARY, J concurring):

[1] The appellant herein appealed against conviction and sentence of 13 months imprisonment having been convicted in the district court of theft out of a motor vehicle. He however pursued his appeal against sentence only.

[2] The court, having heard the appellant and Mr Gaweseb, counsel for the respondent, granted the above order. What follows are the reasons for granting the order.

[3] The appellant raised the following grounds in respect of the sentence:

- (a) the learned magistrate did not adequately take into account that the accused was a first offender and that there was no damage to the vehicle;

- (b) the learned magistrate overemphasised the seriousness of the offence and the interest of society;
- (c) the learned magistrate erred by taking into account the statistics as to the prevalence of theft out of a motor vehicle in his jurisdiction;
- (d) the sentence is so unreasonable that no reasonable court would have imposed such a sentence without the option of a fine.

[4] The learned magistrate stated the following in response to the grounds of appeal: 'I have no additional reasons to add to my ex tempore sentence as delivered on 24 2 2016.' The reasons for sentence are as follow:

'You took possession of property that did not belong (to you), and has it not been for the diligent men and women network you would have gotten away with your crime. This crime that you committed is common in the district and the nation at large. The court has a duty to ensure that our societies are crime free, and to isolate those who do not wish to heed to the morals and norms of society. In arriving at your punishment the court also took into account the fact that you have been in custody for 6 months awaiting trial. Therefore the punishment that fits your crime is a custodial sentence of 13 months imprisonment.'

[5] Mr Gaweseb conceded that the learned magistrate failed to mention the personal circumstances of the appellant or the fact that the appellant was a first offender. This concession is properly made.

[6] The learned magistrate was placed in a position, when confronted with the grounds of appeal, to respond to the issues raised therein which did not form part of the reasons given on record. In *S v Tases*¹ Frank J, as he then was stated as follow:

'In terms of the Magistrates' Courts Rules, Rule 67(3) a magistrate is obliged to furnish such reasons. Only where he has given an ex tempore judgment in which the matters raised in the notice of appeal have been dealt with, may he/she decline to furnish further reasons. Even in such a case the magistrate

¹ 2003 NR 103 (HC) at page 103.

must respond to the notice of appeal by indicating that he/she has nothing to add to the original judgment (S v Vogel 1979 (3) SA 822 H (N) and Williams v Eerste Addisionele Landdros, Bloemfontein 1967 (4) SA 61 (O)).' [my emphasis]

This court is left with no other option but to conclude that he did not take these factors into consideration when he exercised his sentencing discretion.

[7] It is trite that this court may interfere under these circumstances, i.e. where the learned magistrate failed to exercise his discretion in sentencing the appellant properly by taking all the factors into consideration.

[8] The appellant stole N\$5831 from the vehicle. The appellant was holding the handle of the door at the time the complainant locked the vehicle. The Women and Men against Crime Network alerted the police who was able to apprehend the appellant and recover the full amount stolen out of the complainant's vehicle from the appellant. The appellant pleaded not guilty; gave no plea explanation; did not pose any questions to the witness; elected not testify in his defence; and made no submissions before his conviction. During mitigation he informed the court that he is a foreigner and that he had to have an operation. He submitted that he pleaded guilty and did not waste the court's time. The appellant vowed not to do it again. The appellant was detained for almost 7 months before sentencing.

[9] This court took into consideration the aggravating factors as pointed out by the learned magistrate as well as the mitigating circumstances presented by the appellant. The appellant was a first offender, he indicated he had remorse for his deed and he spent almost 7 months in custody. He indicated that he required an operation but it is not clear what type of operation he needed. These factors which mitigate against the offence he committed. The fact that no damage was done to the vehicle is indeed a factor which mitigates his moral

blameworthiness but this ought to be considered against the careful planning and cunning adopted by the appellant. Having considered all the factors herein.

[10] I am of the view that the period of imprisonment imposed by the court *a quo* is unduly harsh. In the result this court held that the period the appellant already served, was considered to have been an appropriate sentence for this offence.

[11] It was against this backdrop that the court made the following order:

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2. The sentence imposed by the district court is set aside and substituted with the following sentence:
 - 2.1 The accused is sentenced to 7 months' and 26 days imprisonment, (i.e. time served) and the accused is to be released forthwith;
3. The sentence is ante-dated to 24 February 2016;
4. Reasons to follow.

M A TOMMASI
JUDGE

H C JANUARY
JUDGE

Appearances:

For the Appellant:

Mr Dube

In Person

For the Respondent:

Adv Gaweseb

Of Office of the Prosecutor-

General