

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

<b>Case Title:</b> <i>Shikondjeleni Moses v The State</i>	<b>Case No.:</b> HC-NLD-CRI-APP-CAL-2019/00072
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice January <i>et</i> Honourable Ms Justice Salionga	<b>Delivered on:</b> 3 December 2019 <b>Released on:</b> 22 January 2020
<b>Neutral citation:</b> <i>Moses v S</i> (HC-NLD-CRI-APP-CAL-2019/00072) [2019] NAHCNLD 149 (3 December 2019)	
<b>IT IS ORDERED THAT:</b> <ol style="list-style-type: none"><li>1. The appeal succeeds;</li><li>2. The Magistrate's sentence delivered on 11 September 2018 is confirmed and is ante-dated to 22 April 2016;</li><li>3. The matter is removed from the roll and considered finalised.</li></ol>	
<b>Reasons for the above order</b>	
SALIONGA J (January J concurring):  [1] This appeal is against a failure by the Magistrate sitting at Outapi to ante-date the sentence of the appellant after he had successfully appealed to this honourable court.	

[2] On 5 July 2018 the appellant successfully appealed against the sentence and the matter was remitted back to the Magistrate for him to further question the appellant about his personal circumstances and sentence the appellant afresh taking into account the period that he already served. On 11 September 2018 the appellant was then sentenced to five years imprisonment of which two years were suspended for a period of four years on condition that the appellant is not convicted of housebreaking with intent to steal and theft during the period of suspension on count 1. On count 2 he was sentenced to three years imprisonment of which one year is suspended for a period of four years on condition that the appellant is not convicted of housebreaking with intent to steal and theft during the period of suspension.

[3] Dissatisfied with the sentence imposed, the appellant filed a second notice of appeal against the sentence. The ground of appeal was that the magistrate failed to take into account the period the appellant already served.

[4] The appellant was represented by Mr Grushabber during the current appeal whilst Mr Pienaar appeared on behalf of the respondent.

[5] It is clear from the record that the High Court order was not complied with and at the same time no reasons were provided by the Magistrate for such a failure. State did not oppose the application and in fact conceded to the fact that a misdirection had occurred.

[6] In *S v Tjiho* 1991 NR (HC) at 366 A-B it was held that the court of appeal will only interfere with the sentence of the trial court 'where (i) the trial court misdirected itself on the fact or on the law; (ii) an irregularity which was material occurred during the sentencing proceedings; (iii) the trial court failed to take into account material facts or overemphasised the importance of other facts; (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.' See also *S v Shapumba* 1999 NR 342 (SC).

[7] In our view a misdirection had indeed occurred and this court is entitled to interfere

with the discretion of the trial court. A failure by this court to interfere would negate the principles of sentencing resulting in the appellant having to serve long unwarranted or undue sentences.

[8] Magistrates are bound by orders and directives of the Superior Courts and are cautioned to comply with them in order to ensure that the rights of the accused are protected and that the time and limited resources are optimally utilised.

[9] Judgment is delivered Ex tempore In the result:

1. The appeal succeeds;
2. The Magistrate's sentence delivered on 11 September 2018 is confirmed and is ate-dated to 22 April 2016;
3. The matter is removed from the roll and considered finalised.

J T SALIONGA JUDGE	H C JANUARY JUDGE

APPEARANCES

APPELLANT:

Mr P Grusshaber

Directorate of Legal Aid, Outapi

RESPONDENT:

Mr J Pienaar

Of Office of the Prosecutor-General, Oshakati