

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI  
APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00039

In the matter between:

**ABSALOM ATUTALE**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Atutale v S* (HC-NLD-CRI-APP-CAL-2018/00039) [2019]  
NAHCNLD 21 (26 February 2019)

**Coram:** JANUARY J *et* SALIONGA J

**Heard:** 05 February 2019

**Delivered:** 26 February 2019

**Flynote:** Criminal Procedure — Sentence —Appeal against — Interference by court of appeal —Such interference only justified where sentence vitiated by irregularity or misdirection —Sentence essentially falling within discretion of trial court— Court to balance interest of individuals, society and purposes of sentence— No misdirection on the exercise of judicial function.

**Summary:** The appellant was convicted of theft of a motor vehicle. He was sentenced to 48 months imprisonment. Dissatisfied with the conviction and sentence imposed, he noted an appeal on grounds that the court did not take into account his personal circumstances and that it overemphasised the seriousness and prevalence of the offence.

It is a settled rule of practice that punishment falls within the discretion of the trial court. As long as that discretion is judicially, properly or reasonably exercised, an appellate court ought not to interfere with the sentence imposed. The discretion may be said not to have been judicially exercised if the sentence is vitiated by an irregularity or misdirection. In this appeal there is no such misdirection or irregularity. The appeal is dismissed.

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### ORDER

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The appeal against sentence is dismissed.

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### JUDGMENT

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SALIONGA J (JANUARY J concurring):

[1] The appellant appeared in the Outapi Magistrates' Court on a charge of theft out of a motor vehicle. He pleaded not guilty on 6 September 2017 and the matter went on trial. After the evidence was led, he was convicted and sentenced to 48 months' imprisonment. The appellant initially filed a notice of appeal against both conviction and sentence but abandoned the appeal against conviction during the appeal hearing. He appeared in person both during the trial and at appeal hearing. Mr Gaweseb appears for the respondent.

[2] The appellant filed his notice of appeal late and is applying for condonation. Mr Gaweseb raised a point *in limine* and submitted that

condonation should not be granted because the reasons for the delay are not reasonable and that there are no prospects of success in the appeal. Appellant explained that he filed his notice of appeal on time but was misplaced. According to the letter from the Ombudsman it couldn't be traced and he was advised to resubmit the notice of appeal. We found the appellant's explanation reasonable and granted the application for condonation and proceeded to hear the appeal on the merits.

[3] The appellant's grounds of appeal are summarised as follows; (a) the court a quo gave insufficient weight to the appellant's personal circumstances; (b) that the seriousness and prevalence of the offence were over-emphasised (c) he also submitted that the court failed to take into account the period the appellant spent in custody awaiting trial and in his view, the sentence is shockingly inappropriate.

[4] It is trite law that sentencing is primarily within the discretion of the trial court and an appeal court may only interfere with the discretion exercised by the trial court in certain limited instances.

[5] These limited instances on which a court of appeal is entitled to interfere with the discretion of a trial court were set out in the matter of *S v Tjiho*<sup>1</sup> where Levy J said the appeal court is entitled to interfere with a sentence if;

- ' i. the trial court misdirected itself on the facts or the law;
- ii. an irregularity which was material occurred during the sentence proceedings;
- iii. the trial court failed to take into account material facts or overemphasized 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'.

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<sup>1</sup> 1991 NR 361 (HC).

[6] As a matter of practice, the court of appeal should be slow to overturn the sentence of the trial court as punishment pre-eminently falls within the discretion of that court. The court hearing the appeal should be careful not to erode such discretion and should only interfere if satisfied that the trial court's discretion was not exercised judiciously and properly.<sup>2</sup> Another test as regards to sentence is whether 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 a court of appeal'.<sup>3</sup>

[7] When applying the foresaid principles to the present facts, it is evident that the court *a quo* was guided by those principles applicable to sentence and that no misdirection was committed on the facts or the law. It was mainly contended that the court failed to take account or gave insufficient weight to the appellant's personal circumstances, while at the same time over-emphasising the seriousness and prevalence of the crime and the interests of society.

[8] From the reading of the judgment on sentence, it is evident that the trial magistrate took into account that the appellant is a first offender, unemployed and is dependent on his sibling to send him money from Windhoek. The fact that the appellant was upgrading his grade 12 points, has no children and is unmarried were considered.

[9] At the same time the trial court considered that the offence of theft of a motor vehicle is a serious one. An amount of N\$5000 which was part of the stolen money from the bag was not recovered. In this regard she suffered actual prejudice. Further considered is the fact that the complainant in this case works so hard to make ends meet by doing business but his efforts were being derailed by persons such as the accused. All these factors were weighed against the appellant's interests before coming to the conclusion that a lengthy custodial sentence is inevitable.

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<sup>2</sup> *S v Ndikwetepo & Others* 1993 NR 319 (SC).

<sup>3</sup> *Supra*.

[10] Despite those facts mentioned favourable to the appellant, this is an instance where the appellant's personal circumstances are substantially outweighed by the seriousness of the offence and the interests of society. We are therefore unable to find any misdirection by the trial court in its evaluation of those factors relevant to sentence, and the weight accorded to each.

[11] Having carefully considered the appellant's reasons for the appeal as well as the respondent's head of arguments before us we are unable to find that the sentence of 48 months' imprisonment imposed is so manifestly excessive that it induces a sense of shock. In light thereof, we are satisfied that the trial court, in sentencing the appellant, exercised its discretion properly and judiciously and there is no basis in law for this court to interfere with the sentence meted out.

[12] In the result, the appeal against sentence is dismissed.

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J T SALIONGA  
JUDGE

I agree

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H C JANUARY  
JUDGE

APPEARANCES:

APPELLANT

Mr A. Atutale

Oluno Correctional Facility, Ondangwa

RESPONDENT

Mr T Gaweseb

Of the Office of the Prosecutor-General, Oshakati.