

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case Title: <i>Hafino Tangeni Ndilipunye v The State</i>	Case No.: HC-NLD-CRI-APP-CAL-2019/00031
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice January J et Honourable Ms Justice Salionga J	Heard on: 24 January 2020 Delivered on: 10 March 2020
Neutral citation: <i>Ndilipunye v S</i> (HC-NLD-CRI-APP-CAL-2019/00031) [2020] NAHCNLD 42 (10 March 2020)	
IT IS ORDERED THAT 1. The appeal against sentence is dismissed;	

Reasons:

SALIONGA J (JANUARY J concurring):

[1] The appellant was convicted in the Magistrates Court sitting at Ohangwena on a charge of theft. The value involved was N\$ 5892 and nothing was recovered. He pleaded not guilty but was convicted after evidence was led and subsequently sentenced to three (3) years imprisonment on 10 October 2018.

[2] Dissatisfied with the sentence imposed, the appellant filed a notice of appeal against his sentence on 8 November 2018 and simultaneously filed an application for condonation of his late filing of the notice of appeal.

[3] The appellant was represented by Mr Shipila during the hearing on the instruction of legal aid whereas the respondent was represented by Mr Pienaar.

[4] At the hearing Mr Pienaar for the respondent raised a point *in limine* and submitted that the appeal should be struck for non-compliance with the rules of the court in that the notice of appeal had been filed out of time. Appellant filed an application for condonation for the late filing of the notice together with an affidavit. In his affidavit appellant explained that he is an illiterate person and was unable to write the notice of appeal by himself. In this regard the court although not satisfied that the applicant had given an acceptable explanation for the delay in the first leg continued to hear the matter on the merits.

[5] Mr Shipila for the appellant submitted that a sentence of three years imprisonment under the circumstances was excessively harsh and induced a sense of shock. He submitted that an appropriate sentence is one that is blended with mercy as this is a sign of an enlightened society and that in this case the Magistrate had no mercy at all for the appellant. He maintained that the Magistrate overemphasized deterrence and by so doing, missed an opportunity to individualize the sentence. He prayed for an appropriate sentence

incorporating a suspension of the whole or part of the sentence as well as the option of a fine.

[6] On his part, Mr Pienaar on behalf of the respondent submitted that this court should be reluctant to interfere with the sentence of the Magistrate unless it is so severe as to be unjust and that the accepted test for determining this is now for the appeal court to enquire whether the sentence is so severe as to give it a sense of shock. He further argued that shock is a strong word and its requirements are not satisfied merely by a desire to interfere on sympathetic or discretionary grounds. Further that the seriousness of the crime may totally outweigh the mitigating factors and the personal circumstances of the offender. He went on to conclude that in the present case there were no circumstances to justify the imposition of a fine.

[7] The issue of sentencing falls squarely within the discretion of the trial court. In *S v Tjiho* 1991 NR 361 (HC) it was stated that the trial court must exercise its discretion in accordance with judicial principles. The court of appeal can only interfere if the discretion is not exercised in this judiciously. It was further held that the court of appeal should be reluctant to erode the trial courts discretion as such erosion would undermine the administration of justice. In *S v De Jagger and Another* 1965 (2) SA 616 AD at 629 it was held that 'if a magistrate has passed a sentence within his jurisdiction and has not misdirected himself on the law and has duly considered the relevant facts, the supreme court will not interfere unless the sentence is so severe as to be unjust and the accepted test for determining this is now for the appeal court to enquire whether the sentence is so severe as to give it a sense of shock'.

[8] It is now evident from the settled rule of practice that the appeal court will not readily interfere with the sentence imposed by the trial court. There are good reasons warranting interference such as where the appeal court is not satisfied that the trial court did properly exercise its judicial discretion or misdirecting itself in sentencing; resulting in an irregularity vitiating the sentence; or that the sentence is disturbingly inappropriate as to induce a sense of shock. However the criterion is not whether the appeal court would have imposed a different sentence, had it sat as the court of first instance.

[9] There is no merit in counsel submission that the Magistrate failed to take into account the appellant's personal circumstances. From a reading of the trial court's judgement on sentence it is evident that a balance was properly struck between the interests of the appellant, the seriousness of the crime and the circumstances under which they were committed; whilst bearing in mind the interests of society.

[10] Regarding the seriousness of the crime committed, the court found that the appellant committed this offence without mercy. The circumstances were that the complainant was the appellant's uncle whom he had been visiting, he was placed in a position of trust when the complainant had left him in his home. The value of the items were high. The trial court further found that this type of offence was prevalent in the district. In this regard it can only be concluded that the trial court was in a much better position than the appeal court as it stooped in the atmosphere of the case and more in touch with the interests of the community in which the crime was committed.

[11] Considering the above we found that there was no misdirection or irregularity committed in this matter. It is clear that the Magistrate treated this offence as a serious one and that alone should not be seen as having overemphasized one factor above the others. In *S v Kambu* 1998 NR 194 (HC) at 196 E the court warned that the imposition of a fine in serious offences creates the wrong impression that the court endeavoured to keep the accused out of prison and boomerang especially in those cases where a fine is not a proper and appropriate sentence. I must sound a note of warning expressed. In our view, theft is a serious offence and the Magistrate exercised his discretion judiciously and the appeal stands to fail.

[12] In the result:

1. The appeal against sentence is dismissed;

Judge(s) signature	Comments:
Salionga J:	None
January J:	None