

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case Title: <i>Teofelus Nadhipite Angolo and Oscar Kalimbo v The State</i>	Case No: HC-NLD-CRI-APP-CAL-2020/00058
	Division of Court: Northern Local Division
Heard before: Honourable Ms. Justice Salionga J et Honourable Mr. Justice Small AJ	Heard on: 18 February 2021 Delivered on: 11 March 2021
Neutral citation: <i>Angolo v S</i> (HC-NLD-CRI-APP-CAL-2020/00058) [2021] NAHCNLD 22 (11 March 2021)	
The order: 1. The appeal is dismissed.	
Reasons for the order: SMALL AJ (SALIONGA J concurring): <i>Introduction</i> [1] The appellants were arraigned in the Magistrate's Court, Ondangwa on a charge of theft. The State formulated the charge as follows: 'In that upon or about 4 July 2018 and at or near Kunene Africa Supermarket Omuthiya in the district of Ondangwa the accused did unlawfully and intentionally steal boxes of liquor the property or in the lawful possession of Japhet Ngima Amutheya. The liquor listed was valued at N\$6 479.00	

[2] The appellants pleaded not guilty to the charge on 29 August 2019 but were convicted on 6 February 2020 and both were sentenced to 24 months imprisonment. The appeal is against sentence only.

[3] The appellants are represented by Mr Ngula and the respondent is represented by Mr. Gaweseb.

[4] Mr Ngula submitted in line with the grounds in the notice of appeal that the presiding magistrate erred in fact and law during sentencing. He did not sufficiently consider the appellant's mitigating factors and personal circumstances. They were first-time offenders, youthful and breadwinners of their families and were remorseful. The Court imposed a custodial sentence without considering a fine or a suspended sentence. He further submitted that the sentence is startlingly inappropriate, induces a sense of shock and that the punishment imposed is strikingly disproportionate to the offence and out of sync with similar crimes and penalties imposed. He also referred the Court to several other cases in which accused received sentences which appear to be more lenient, if compared to the present case.

[5] Mr. Gaweseb submitted that this Court cannot interfere in the circumstances of this case because the Court a quo, who has the sentencing discretion committed no misdirection entitling this Court to interfere on appeal. The principles were recently summarized once again in *Nande v S*¹ 'It is trite that punishment falls within the ambit of the discretion of the trial court and that a Court of Appeal should not readily interfere unless there is good cause; and there will be good cause where the sentence is vitiated by irregularity or misdirection or, where the sentence imposed is disturbingly inappropriate and induced a sense of shock. To come to such conclusion, the Court must be satisfied that the sentencing court did not exercise its discretion, regarding sentence, judicially'².

[6] What is meant by shockingly inappropriate or inducing a sense of shock was described as follows in *R v Lindsay* 1957 (2) SA 235 (N) at 235F-H and applied in *S v Ngombe*³

¹ (HC-NLD-CRI-APP-CAL-2020/00025) [2020] NAHCNLD 165 (19 November 2020)

² *Nande v S* (HC-NLD-CRI-APP-CAL-2020/00025) [2020] NAHCNLD 165 (19 November 2020) paragraph 12 referring to *S v Ndikwetepo and Others*, 1993 NR 319 (SC) at 322F-J; *S v van Wyk*, 1993 NR 426 (HC) at 447G-448B; *S v Ivanisevic and Another*, 1967 (4) SA 572 (A) at 575F-G.

'Judging by the appeals against sentences which come before us, it would not appear to be sufficiently appreciated that the Supreme Court does not have an overriding benevolent discretion to ameliorate magistrates' sentences. The matter is governed by principle, not by ad hoc discretion. And the principle is this: 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 (at any rate in Natal) is for the appeal Court to enquire whether the sentence is so severe as to give it a sense of shock. Now "shock" is a strong word, and its requirements are not satisfied merely by a desire to interfere on sympathetic or discretionary grounds. All this is well settled, but I think it merits emphasis, for the guidance of the profession, and so that Judges may be on their guard against any tendency to substitute their discretion for that of the magistrate and to vary the sentence to one which they would have imposed if they had been sitting as a court of first instance.'

[7] A Court misdirects itself if the dictates of justice require that it should have regarded certain factors and failed to do so, or that it ought to have assessed the value of these factors differently from what it did. Such a misdirection then entitles an appeal court to consider the sentence afresh.⁴

[8] Not every misdirection entitles a Court of appeal to interfere with the sentence. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably. In this context, misdirection means an error committed by the trial Court in determining or applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially.⁵

[9] It must be understood that only mitigating factors that existed at the time when the Court a quo imposed its sentence can be considered by an Appeal Court. An Appellant cannot raise new

³ 1990 NR 165 (HC) 168E-G:

⁴ in *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E

⁵ *S v Pillay* 1977 (4) SA 531 (A) per Trollip JA at 535D-G and *S v Redondo* 1992 NR 133 (SC) at 153A-E

mitigating factors, not mentioned to the trial Court, for the first time on appeal and submit that such factors should now be considered or that the trial Court did not consider them.⁶

[10] From the facts of the matter the Appellants were both gainfully employed and stole from their employer. They were in a position of trust and misused the trust. They gave a cleaner also employed there a trolley containing the liquor to take outside. After she complied, they praised her and gave her N\$600.00. Not only did they steal they made another employee to take the risk on their behalf.

[11] The principle of consistency advocated from time to time must consider that the imperfection inherent in criminal trials means that persons similarly placed may not necessarily receive similar punishment. What also needs to be acknowledged is that the possibility of error will be present in any justice system. There cannot be perfect equality between accused persons in the conduct and outcome of criminal trials when they appear before different courts each clothed with the discretion to impose an appropriate sentence. We must accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to jail when others similarly placed may be acquitted or receive non-custodial sentences.⁷ The mere fact that there is an inconsistency does not mean that the Court a quo misdirected itself or imposed a shockingly inappropriate sentence.

[12] The trial Court took all the mitigating circumstances into account and committed no misdirection when sentencing the appellants. The sentence imposed is also by no means disturbingly inappropriate and does not create a sense of shock.

[13] In the result, it is ordered that:

⁶ *Rex v Verster* 1952 (2) SA 231 (A); *Rex v Zurnamer* 1951 (3) SA 418 (C) 423F-G

⁷ *S v Mwakwanyane and Another* [1995] ZACC 3; [1995 \(2\) SACR 1](#) (CC) par [54] referred to in *S v Munyama* (SA 47/2011) [2011] NASC 13 (9 December 2011) paragraph 13

1. The appeal is dismissed.	
	Comments:
Small AJ	NONE
Salionga J	NONE
Counsel:	
Appellant	Respondent
Mr. N. Ngula Of Nicky Ngula Attorneys, Ondangwa	Mr. T. Gaweseb Of Office of the Prosecutor-General, Oshakati