



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 26/2017

In the matter between:

JONAS JOHN NGHIDINWA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nghidinwa v S* (CA 26/2017) [2017] NAHCNLD 83 (15 August 2017)

Coram: TOMMASI J and JANUARY J

Heard: 8 August 2017

Delivered: 15 August 2017

Flynote: Appeal — Sentence — Previous convictions — In this case not a previous conviction in the true sense — Court however entitled to take it into consideration to determine matters like the appellant's good or bad character, his reformability and the like, in order to decide what particular form of punishment will fit the criminal, as well as the crime (*R v Zonele and others*) 1959 (3) SA 319 (A) at 330D).

Summary: The appellant was convicted of escape from lawful custody which took place before the second conviction of escape from lawful custody. He was sentenced to 15 months' imprisonment and it was ordered to run consecutively with the sentence he was serving at the time. The court held that the magistrate was entitled to consider the "previous conviction"; and to impose a sentence which was aimed at personal deterrence. The court further held that the sentence imposed was consistent with sentences imposed for the same offence particularly where one considers that more severe sentences are imposed for first offenders. The appeal is dismissed.

ORDER

1. The appeal against sentence is dismissed.
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JUDGEMENT

TOMMASI J (JANUARY J concurring)

[1] This is an appeal against sentence. The appellant was convicted of escaping from lawful custody. He was sentenced to 15 months' imprisonment and it was ordered to be served consecutively with the sentence the appellant was already serving.

[2] The appellant's grounds of appeal essentially take issue with the magistrate's failure to have taken into consideration that: he is a first offender; he pleaded guilty and did not waste the court's time; he is a breadwinner; and that he suffers from high-blood-pressure (hypertension). He furthermore is of the view that his sentence is harsh and unreasonable and the learned magistrate ought to have ordered that his sentence run concurrently with the second sentence.

[3] The learned magistrate indicated in her additional reasons that she was alive to the general principles of sentence and she imposed the sentence with personal deterrence in mind. She furthermore held the view that if she erred, then her error would be that the sentence she imposed was on the lenient side.

[4] It is trite that the court of appeal would not readily interfere with the exercise of a lower court's sentencing discretion unless there has been a misdirection by the trial magistrate, a vitiating irregularity occurred or if the sentence is so inappropriate as to create a sense of shock.

[5] The appellant committed the offence of escaping from lawful custody on 5 July 2016. On 8 March 2017 he was convicted of this offence and the state proved two "previous convictions" One of these previous convictions was escaping from lawful custody. On 28 November 2016 he was also convicted of escaping and he was sentenced to 15 months' imprisonment which was ordered to run concurrently with the sentence he was serving at the time. The appellant was represented at his trial. His legal practitioner submitted in mitigation that the appellant should be considered as a first offender because he committed this offence of escape first and thereafter he committed the second offence of escape but he was convicted of the second escape first.

[6] It is clear that the learned magistrate took the previous offence into consideration as she indicated that the purpose of the sentence was to act as a deterrent sentence for the appellant. The issue for consideration is whether the learned magistrate erred by taking the previous conviction into consideration.

[7] In *S v Shipena* 2009 (2) NR 810 (HC), at page 818, paragraph 31 Van Niekerk J stated as follow:

'In this regard I wish to deal with what the State referred to as the appellant's previous conviction. Clearly the appellant's convictions on the 171 counts of theft are not previous convictions in the true sense of the word, as the appellant was not convicted of these offences before he committed the offences which form the subject matter of this appeal (see *R v Zonele and Others*) 1959 (3) SA 319 (A) at 330D; *S v Amalovu and Another* 2005 NR 438 (HC) at 444D). It can therefore not be said that the previous convictions aggravate the offences in casu on the

grounds that they tend to show that the appellant had not been deterred by his previous punishment from committing the later offences (Zonele supra at 330D - E). However, the convictions may be taken into consideration to determine matters like the appellant's good or bad character, his reformability and the like, in order to decide what particular form of punishment will fit the criminal, as well as the crime (Zonele supra at 330E - 331B; Amalovu supra at 448H - I).'

[8] In this matter the "previous conviction" is also not a true previous conviction in the sense that the appellant had committed this offence first and the conviction which was proven as a previous conviction was committed after the appellant had committed this offence. It is my considered view that the sentencing court was entitled to consider this factor. The court correctly concluded that the sentence ought to serve as a personal deterrent to dissuade the appellant from committing similar offences.

[9] In considering whether this sentence is unnecessarily harsh and unreasonable, one only has to look at this court's approach when it comes to escape from lawful custody. Ms Nghiyoonyane, counsel for the respondent referred this court to a number of cases where more severe sentence were confirmed on appeal. In *S v Ashimbanga* 2014 (1) NR 242 (HC), at p246, paragraph 22, Van Niekerk J (Ueitele J concurring) remarked as follow:

'The problem for the appellant is that escape from lawful custody usually attracts a custodial sentence because of the seriousness of the offence. For first offenders the length of the period of imprisonment has increased slowly but surely over the years from about six months to about two years, depending on the circumstances of each case.'

It is this court's considered view that the sentence of 15 months' imprisonment, even for a first offender, is not unnecessarily harsh and unreasonable. I believe that the magistrate indeed gave due consideration to the mitigating circumstances, such as the fact that he pleaded guilty, to arrive at the sentence of 15 months' imprisonment.

[10] The legal practitioner requested the court to consider ordering that the sentence run concurrently with the sentence of 15 months' imprisonment which was imposed in respect of previous conviction. The learned magistrate exercised her discretion against the concurrent serving of sentence. The purpose of an order in terms of s 280(2) that sentences run concurrently, is to ameliorate the cumulative effect of sentences. The

appellant was serving a sentence of 15 months' imprisonment for theft and escape from lawful custody. The seriousness of the offence which the appellant was convicted of should not be overlooked. I have already indicated that the sentence in this matter is not unduly severe and I am not persuaded that the learned magistrate erred when she ordered the sentence to run consecutively to the sentence he was serving at the time.

[11] In the result the following order is made:

1. The appeal against sentence is dismissed.

MA Tommasi

Judge

I agree

H C January

Judge

APPEARANCE:

For the Appellant:

In person

Oluno Correctional Facilitation Center

For the Respondent:

Adv M. Nghiyoonanye

Office of the Prosecutor General

Oshakati