



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

Case no: CA 68/2012

In the matter between:

OLAVI IIYAMBO**APPELLANT**

and

THE STATE**RESPONDENT**

Neutral citation: *Iiyambo v State* (CA 68/2012) [2013] NAHCMD 42 (8 February 2013)

Coram: MILLER AJ and PARKER AJ

Heard: 8 February 2013

Delivered: 8 February 2013

Flynote: Criminal procedure – Sentence – Appeal against – Sentence pre-eminently falling within discretion of trial court.

Summary: Criminal procedure – Sentence – Appeal against – Interference by appeal court – Appeal court does not have unfettered discretion to reconsider sentence imposed by trial court – Principle in *S v Ndikwelepo and Others* 1993 NR 319 applied – Appeal court may only interfere with trial court's exercise of discretion if sentence imposed is so manifestly excessive that it induces a sense of shock in the mind of appeal court – *In casu*, on the facts, and in the circumstances, of the

case court not persuaded that sentence imposed by trial court is shockingly inappropriate – Consequently court dismissed appeal.

Flynote: Criminal procedure – Any submission by public prosecutor or defence counsel on any matter in the proceedings do not bind the court.

Summary: Criminal procedure – Submissions by public prosecutor on any matter during proceedings does not bind the court – *In casu* public prosecutor proposed a sentence of six months' imprisonment but magistrate imposed a sentence of two years' imprisonment – Appellant takes issue with the magistrate not accepting public prosecutor's proposal – Submissions by public prosecutor or defence counsel on any matter, including sentence, do not bind the court.

ORDER

The appeal is dismissed.

JUDGMENT

MILLER AJ (PARKER AJ concurring):

[1] The appellant represents himself. The State is represented by Mr Nduna who filed heads of argument and he stands by those.

[2] The appellant in this matter was charged before the Magistrate of Swakopmund with the crime of housebreaking with intent to steal and theft. He was represented at the trial and upon being arraigned tendered a plea guilty to theft which plea the State accepted.

[3] The appellant's legal representative thereupon handed up a document in terms of section 112(1)(b) of Act 51 of 1977 and the magistrate thereupon in my view correctly convicted the appellant on the charge of theft. The facts briefly are that the appellant was at the relevant time employed as security guard by a security firm based in Swakopmund. He was summoned to attend to an alarm at a residential property and upon his arrival he found the door to be open. The appellant then entered the house and removed various valuable items from the house which he wanted to dispose of.

[4] The appellant's legal representative on the question of sentence placed the personal circumstances of the appellant before the magistrate. He emphasized that the appellant had pleaded guilty and that he was sorry for what he had done. He also pointed to the fact that the appellant was a first offender. The prosecutor thereupon addressed the learned magistrate and during the course of his address proposed to the magistrate that a sentence of six months imprisonment without the option of a fine was in his view an appropriate sentence. The magistrate instead imposed a sentence of two years imprisonment upon the appellant and it is against that sentence that the appeal lies.

[5] Pursuant to the noting of the appeal the learned magistrate provided written reasons for the sentence she had imposed and the court is indebted to the magistrate for her efforts in this regard. The magistrate emphasized, in my view without overemphasizing, the fact that the appellant was a security guard and thus in the position of trust. He breached the trust not only of his employer but also the employer's clients to whom he owed a duty in the sense that he was there to protect the property and not to steal it. The magistrate correctly took into account the fact that the appellant was a first offender and she also considered the fact that he pleaded guilty.

[6] In the end the magistrate concluded that the appellant's personal circumstances and interests did not measure up to the gravity of the crime committed and the interest of society. It has been pointed out on numerous occasions that weighing up the interest of society against the personal

circumstances of the appellant is a balancing exercise and that given the particular circumstances of a case the interests of society may outweigh the personal circumstances of the appellant or vice versa. In any event, as it was pointed out by the Supreme Court in the case of *S v Ndikwetepo and Others* 1993 NR 319 (SC) this Court sitting as a court of appeal does not have an unfettered discretion to reconsider the sentence imposed by the magistrate. The learned judges in that judgment made it plain that punishment is pre-eminently a matter of discretion vesting in the trial court and stated that this court, sitting as a court of appeal, will only interfere with the sentence if it is so manifestly excessive that it induces a sense of shock in the mind of the court.

[7] I am not persuaded that the magistrate in exercising her discretion to impose the sentence of two years imprisonment imposed a sentence which to my mind induces a sense of shock.

[8] The appellant points to the fact that the prosecutor had submitted that six months imprisonment was appropriate. Although such a suggestion may in the circumstances of the particular case be helpful it must be borne in mind that the magistrate's discretion as to what sentence to impose will not be fettered by what the prosecutor thinks an appropriate sentence is. The question of sentence and what is appropriate and what not is an unfettered discretion which the learned magistrate exercises. In all these circumstances it seems to me that the sentence imposed was not shockingly inappropriate and I would therefore dismiss the appeal.

P J Miller
Acting Judge

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C Parker
Acting Judge

APPEARANCES

APPELLANT: In Person.

RESPONDENT: S Nduna
Of Office of the Prosecutor-General, Windhoek.