

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION

APPEAL JUDGMENT

Case No: HC- MD-CRI-APP-CAL-2020/00057

In the matter between:

JOSEPH GANASEB

APPELLENT

and

THE STATE

RESPONDENT

Neutral citation: *Ganaseb v S* (HC-MD-HCMD-CRI-APP-CAL-2020/00057) [2021]
NAHCMD 151 (8 April 2021)

Coram: USIKU, J, (CLAASEN J concurring)

Heard: 8 March 2021

Delivered: 8 April 2021

Flynote: Appeal – Sentencing – Escape from lawful custody – Section 271(4) of Criminal Procedure Act – Previous convictions must be taken into account in sentencing

– The weight to be accorded to previous convictions, is part of the sentencing discretion of the court. – Appeal dismissed.

Summary: The appellant has appealed against his sentence of 48 months direct imprisonment for the offence of escaping from lawful custody. The appellant in setting out his grounds of appeal, referred to himself as a first offender, which is not a true picture of his history before the courts. Appellant had five previous convictions that were proven in this matter.

Held that previous convictions will invariably be regarded as aggravating when it comes to sentencing.

Held further that; courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice. There was no misdirection by court a quo, the appeal is dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

USIKU J, (CLAASEN J, concurring):

[1] The appellant was charged with one count of escaping from lawful custody on 20 July 2019 at or near the Henties Bay Police Station in the district of Swakopmund. The appellant pleaded guilty to the count and was convicted of the common law offence of escaping from lawful custody in the Swakopmund Magistrates court. On 29 October 2019, the learned Magistrate sentenced him to 48 months direct imprisonment. The appellant filed a notice of appeal against his sentence on 12 June 2020.

[2] The appellant elected to argue his appeal in person whilst Mr. Muhongo appeared for the respondent.

[3] The grounds *inter alia* of the accused's appeal are that the learned Magistrate erred by not taking into consideration that the accused had not damaged any property during his escape from lawful custody and that he voluntarily returned to the prison after the escape without the need of an arrest to be made.

[4] The appellant emphasized his personal circumstances in that he is aged 23 and is the father of a four year old girl and that he is responsible for her care. As a result of his incarceration the minor is now under the care of his parents and the appellant is also financially responsible for his parents.

[5] One of the grounds cited by the appellant in his notice of appeal was that he was a first time offender and that the learned Magistrate failed to take cognisance of this fact.

This is however not the true picture of his history in the courts of Namibia, as will be seen by the factors highlighted by the prosecutor in aggravation of sentence. One of the strongest factors in aggravation turned out to be the five previous convictions which the appellant admitted before the court a quo. The prosecutor stated that the list paints the accused person as a person who has complete disregard and disrespect for the law. Further factors relied upon by the prosecutor is that the offence is serious in nature and prevalent.

[6] The information in mitigation was that the accused tendered a guilty plea and expressed remorse for what he has done. Though unemployed at the time, he stated that he can pay a fine.

[7] In considering the reasons by the Magistrate before the imposition of the sentence, reference is made to: 'they are first offenders'...¹ Clearly it amounts to a typing error and it is also clear further in the record that the Magistrate regarded the five previous convictions were alarming as it was indicative of his complete disregard for the

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law. Thus though the Magistrate was mindful of the guilty plea and the accused being the father of a child, it had to be weighed against the prevalence and seriousness of the offence as well the previous convictions.

[8] In *S v Rabie*² the court held that:

‘Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstance’.

[9] This court in a recent judgement dealt with a similar situation and it will suffice to restate what was said in *State v Muchaka*³ at para 5:

‘Previous convictions will invariably be regarded as aggravating when it comes to sentencing and more over where the subsequent offence is committed shortly after the previous one. In the present instance these offences were all committed within the same year. Earlier convictions impact on the character of the offender, especially where he or she was not deterred by the experience of previous convictions and sentences. In this instance that seems to be the position with the accused who, despite having been convicted and sentenced to the payment of fines in the past, has neither reformed himself, nor does he seem to have been deterred by the earlier sentences imposed. Against this background, a more deterrent sentence seems justified. In determining what sentence in the circumstances of the case would be suitable, the court must still have regard to all those principles applicable to sentence. The court is still required to consider the accused's personal circumstances (of which his previous convictions is but one factor) against the seriousness of the offence committed, and the interests of society. What weight should be accorded to this factor, lies within the discretion of the court.’

[10] It is trite that the courts will not interfere with a sentence imposed by a lower court if such sentencing was exercised judiciously. In *S v Tjiho*⁴ it was held at 366A-B:

‘This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal courts will interfere, but short of this, courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice’

² *S v Rabie* 1975(4) SA 855 at 862 G-H

³ *State v Muchaka* CR 20/2017 [2017] NAHCMD 69 delivered on 10 March 2017

⁴ *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 693)

[11] After having considered the factors in mitigation and that in aggravation of sentence, it is my considered view that grounds of appeal are not sustainable. The Magistrate could not ignore the previous convictions as section 271(4) of the Criminal Procedure Act⁵ provides that a court must take previous convictions, once its proven, into account in sentencing. There was no misdirection by the Magistrate, as a deterrent sentence was called for in the circumstances. That being the case, I come to the conclusion that the appeal must fail.

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

The appeal is dismissed.

D N USIKU
Judge

C M CLAASEN
Judge

⁵ Section 271(4) of the Criminal Procedure Act 51 of 1977 as amended

APPEARANCES

APPELLANT

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RESPONDENT

MR. MUHONGO
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