

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: <i>The State v Uejaa Tjiroze</i>	Case No:OTN-CRM-433/2023 CR 148/2023
High Court MD Review No: 1785/2023	Division of Court: Main Division
Heard before: Shivute J et January J	Delivered on: 13 December 2023
Neutral citation: <i>S v Tjiroze</i> (CR 148/2023) [2023] NAHCMD 823 (13 December 2023)	
The order: <ol style="list-style-type: none">1. The sentence of five years' imprisonment of which two years is suspended for five years on condition that the accused person is not convicted of escaping from lawful custody, whether under common law or statutory law, committed during the period of suspension is set aside.2. The accused is sentenced to two years' imprisonment.3. The sentence is backdated to 5 October 2023.	

Reasons for order:

JANUARY, J (SHIVUTE J concurring)

[1] This review matter is submitted from the Otjinene magistrate's court in terms of ss 302(1) and 303 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused person was convicted of escaping (common law), on his plea of guilty. The magistrate applied s 112(1)(b) of the CPA, as amended. He was sentenced to five years' imprisonment of which two years imprisonment is suspended on condition that accused is not convicted of escaping from lawful custody.

[3] The accused was 21 years old at the time of sentencing, a first offender and he pleaded guilty to the charge on his first appearance. The sentence is harsh and the maximum sentence in the court a quo's sentencing jurisdiction.

[4] Consequently, I directed a query to the magistrate, for an explanation on what prompted him to impose the maximum sentence in that court's jurisdiction on a first offender.

[5] The magistrate responded as follows, first quoting the query:

1. 'The Magistrate must please explain what prompted him to impose the maximum sentence in the court's jurisdiction on this 21 years old accused who is a first offender
2. 'The reason that the magistrate imposed a maximum sentence are (sic) as follows:
 - 2.1 Two years of the sentence is suspended for a period of 5 years on the usual conditions this is because of the prevalence of the offence in the district of Otjinene and its seriousness.
 - 2.2 The purpose of the sentence is twofold. That the accused showed no remorse and regret for his actions and further to deter would be offenders.
 - 2.3 The second fold is that a lengthy custodial sentence for the accused persons in general proves to be beneficial as opposed to a short custodial sentence where the accused are kept merely in cells whilst serving time, as opposed to where lengthy periods are imposed and the accused are exposed to social workers, and rehabilitative programs in correctional facilities.

2.4 The accused is indeed a first-time offender, with no previous convictions and the court was also of the opinion that if sentenced to a lengthy period and sent to a correctional facility he could benefit from the programs offered there and come back a rehabilitated young man who would be able to contribute to his community.

However if the Honorable Reviewing Judge does not see the reasons advanced just and in accordance with justice for such sentence imposed by the learned magistrate, the learned magistrate leaves it in the hands of the court.'

[6] The magistrate stated in the reasons for sentencing that he will not expose the accused to the full extent of the court's jurisdiction. With all due respect, the magistrate did not practice what he preached. The jurisdiction of lower court are stipulated in the s 92 of the Magistrates Courts Act 32 of 1944 as follows:

92 Limits of jurisdiction in the matter of punishments

(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence-

(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding five years, where the court is not the court of a regional division, or not exceeding twenty years, where the court is the court of a regional division; (my underlining)

(b)

[Para (a) and (b) substituted by sec 1 of Act 14 of 1981
and by sec 6 of Act 9 of 1997.]

(c)

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[Sec 92 amended by sec 21 of Act 40 of 1952,
substituted by sec 1 of Act 16 of 1959, amended

by sec 14 of Act 19 of 1963 and substituted by sec 30 of Act 94 of 1974 and amended by sec 1 of Act 14 of 1981.]'

[7] It is clear that the court's maximum sentencing jurisdiction by imprisonment is five years imprisonment. If the magistrate reasoned that by suspending a portion thereof, it is not the maximum of five years, he was wrong. This court expressed itself as follows in this regard:

'It is a well-established principle that 'the sentence passed for a particular offence consists of both the unsuspended and the suspended portions thereof' and the full bench, in *State v Mbahuma Tjambiru and Two Others* at 5 (para 4), said the following in this regard:

'When it comes to sentencing the correct approach of the trial court is to decide on an appropriate term of imprisonment and thereafter to determine whether to suspend such sentence wholly (where permissible) or partially. The portion of the sentence suspended thus remains an integral part of the sentence and cannot be treated as something separate from or additional to the non-suspended portion of the sentence. . . .'¹ (my emphasis)

[8] The personal circumstances of the accused at the time of sentence is that he was 21 years old. He was unemployed, single, has no children and pleaded guilty. The magistrate considered these facts as mitigation. He considered that the crime was serious, prevalent and sentenced the accused mentioning, deterrence, rehabilitation, reformation and retribution. He attached more weight to retribution and considered to extend mercy when he stated that the accused person will not be exposed to the full extent of the court's jurisdiction.

[9] Contrary to his consideration of mercy, the magistrate did impose the maximum sentence. With respect, paying lip service to the element of mercy. It is clear that he overemphasized the seriousness of the crime. In addition, the magistrate did not consider uniformity of sentences. It is true that the norm for punishing the crime of escaping, whether under common law or statutory, is direct imprisonment. Considering the sentences imposed in similar cases for youthful first offenders, in this regard, range from

¹ *S v Lwishi* 2012 (1) NR 325 (HC).

six months to three years imprisonment. The magistrate, thus, was wrong and misdirected himself in imposing the maximum sentence in the circumstances.

[10] In the result:

1. The sentence of five years' imprisonment of which two years is suspended for five years on condition that the accused is not convicted of escaping from lawful custody, whether under common law or statutory law, committed during the period of suspension is set aside.
2. The accused person is sentenced to two years imprisonment.
3. The sentence is backdated to 5 October 2023.

H C JANUARY
JUDGE

N N SHIVUTE
JUDGE