



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
APPEAL JUDGMENT**

**Case no CA 27/2016**

In the matter between:

**PAULUS MUTETE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Mutete v S* (CA 27/2016) [2017] NAHCNLD 16 (01 March 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard:** 10 February 2017

**Delivered:** 03 March 2017

**Flynote:** Criminal Procedure — Appeal — Sentence — Appellant sentenced to 3 years' imprisonment — Mitigation — No assistance by the magistrate — No proper mitigation — Overemphasizing deterrence — Sentence inappropriate — Sentence reduced.

**Summary:** The appellant pleaded guilty in the magistrate's court on a charge of escaping from lawful custody. He escaped from a hole that was cut in the roof of the police cells. The personal circumstances of the appellant are scanty and the magistrate did not assist the appellant to place mitigating factors before court. The magistrate overemphasized deterrence and took information of previous cases of escapes from

custody as aggravating against appellant. The magistrate misdirected himself. The sentence is found to be inappropriate and shocking. The sentence is reduced to 2 (two) years' imprisonment of which 6 (six) months are suspended.

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## **ORDER**

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1. The appeal succeeds;
  2. The sentence of 3 (three) year's imprisonment is set aside; and substituted with the following sentence:
  3. The accused is sentenced to 2 (two) years' imprisonment of which 6 (six) months imprisonment is suspended for 5 (five) years' on condition that the accused is not convicted of escaping from lawful custody, committed during the period of suspension.
  4. The sentence is antedated to 18 January 2016.
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## **APPEAL JUDGMENT**

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### **JANUARY J, TOMASSI J (CONCURRING)**

[1] The appellant was convicted for escaping from lawful custody<sup>1</sup> on his plea of guilty. He was sentenced to 3 (three) years' imprisonment. The matter was sent on review and the sentence was confirmed. The appellant now appeals against the sentence.

[2] The grounds of appeal are that:

1. The trial court misdirected itself on the facts;
2. The trial court failed to take into account material facts;

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<sup>1</sup> Under the common law.

3. The sentence is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that, which would have been imposed by the court of appeal.

[3] Ms Samuel appears *amicus curiae* for the appellant and Mr. Pienaar is representing the respondent.

[4] Sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.<sup>2</sup>

[5] The appellant was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977. The conviction is in order and is confirmed. There are merits in the appeal and the certificate that the proceedings are in accordance with justice is hereby withdrawn.<sup>3</sup>

[6] I agree with what was stated by Damaseb JP (Shivute J concurring):

[9] A trier of fact has a duty to assist an unrepresented accused. The question is the scope and extent of the assistance to be given to the accused, especially one who takes the conscious decision not to enlist the services of a legal practitioner even at state's expense. The first point to be made is that the conscious decision not to enlist the services of a lawyer should not be used as some kind of

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<sup>2</sup> *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

<sup>3</sup> See: Hiemstra's Criminal Procedure, Issue 1, 2009, Lexis Nexis at p30-25; Withdrawal of certificate.

punishment against an accused; nor does it offer the trier of fact the licence to leave the accused to his own devices. Secondly, the duty to assist the unrepresented accused does not end with the trier of fact giving formulistic explanations of the procedural rights of the unrepresented accused. Thirdly, the assistance must be of substance and be meaningful: it requires of the trier of fact to be vigilant throughout the trial, remembering always that the state bears the onus to prove the accused's guilt beyond reasonable doubt and that the accused has no duty to prove his innocence, let alone to give any explanation at all. If during the trial the accused makes any suggestion, or from state's witnesses any evidence emerges which either points towards innocence or throws doubt on the state's case, it is the duty of the trier of fact to direct the accused's attention thereto and to suggest in what way it may possibly assist his or her case.<sup>4</sup>

The above quoted remark was made in relation to conviction but it is applicable also to sentencing. The magistrate used a formulistic explanation to explain the appellant's rights to mitigation and did not assist him to place mitigating factors before court.

[6] The appellant admitted that he escaped from lawful custody by escaping through a hole that was cut in the roof cells of the Oshikango Police cells. He escaped to go and start school.

[7] In mitigation the appellant only addressed the court from the dock. He stated that: 'I am asthmatic therefore I am asking for a lesser sentence. I have problems with my eyes, they hurt when I look into the light. I want the court to be lenient (sic) because I want to return to start school.' The learned magistrate did not assist the appellant who was unrepresented to place other personal circumstances i.e. his age, level of education, employment, dependants, marital status, etcetera before court in mitigation. The charge sheet reflects that the appellant was 24 years of age. The State did not prove any previous convictions.

[8] The magistrate states in his reasons *inter alia* as follows:

'The court has taken into consideration accused mitigating factors, that accused is asthmatic and has eye problems however the offence remains very serious

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<sup>4</sup> S v SS 2014 (2) NR 399 (HC) at 402 E-I

and prevalent in the district of Eenhana, accused person totally undermined the work of law enforcement agent, further state property was damaged therefore state suffered monetary loss.

This is a pure sign of disrespect therefore accused needs to be taught that crime does not pay. Just 3 days prior to the accused escaping another group of inmates were sentenced for escaping from lawful custody for 2 years direct imprisonment with no option of a fine.

This was to serve as a deterrent sentence for both accused persons and would be offender, however it seems no lesson was learned. This court will impose a fit and proper sentence in this regard. Accused person escaped in the exact same fashion as the other accused persons that were sentenced prior to his escape. A roof was cut and what is aggravating is that it was premeditated. This hole in the roof was planned for months which means accused persons were well aware of their doings.....' [my emphasis]

[9] The learned magistrate provided additional reasons and again emphasized the seriousness of the offence, the prevalence of the offence, that he deals with it on a daily basis and the need for deterrence of would be offenders.

[10] Escaping from lawful custody is indeed a serious offence. It is trite that it attracts a custodial sentence. There is however no evidence in this case that the appellant planned the escape for months and no evidence that it was he who cut the hole in the roof. In my view the magistrate over emphasized the factor of deterrence and imposed a sentence to make an example of the accused. The magistrate did not properly apply his mind to mitigating factors. He used his knowledge of previous escapes of inmates and used the information as aggravating against the appellant. The magistrate furthermore does not differentiate between this matter and the other cases where he imposed a sentence of two years imprisonment. The sentence is inappropriate for a first offender, who pleaded guilty, showing remorse and it induces a sense of shock.

[11] In the result:

1. The appeal succeeds;
2. The sentence of 3 (three) year's imprisonment is set aside; and substituted with the following sentence:
3. The accused is sentenced to 2 (two) years' imprisonment of which 6 (six) months imprisonment is suspended for 5 (five) years' on condition that the accused is not convicted for escaping from lawful custody, committed during the period of suspension.
4. The sentence is antedated to 18 January 2016.

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HC JANUARY

JUDGE

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MA. TOMMASI

JUDGE

APPEARANCE:

FOR THE APPELLANT:

Ms Samuel

Of Samuel Attorney

FOR THE RESPONDENT:

Mr Pienaar

Of Prosecutor General –

Oshakati