

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case no: CA 15/2017

In the matter between:

NIKANOR TUNYANYUKWENI IIPINGE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Iipinge v S* (CA15/2017) [2017] NAHCNLD 71 (06 July 2017)

Coram: TOMMASI J and JANUARY J

Heard: 20 JUNE 2017

Delivered: 06 JULY 2017

Flynote: Criminal Procedure – Appeal – sentence - no merit in ground that court exceeded jurisdiction – s 92 of Magistrate’s Court Act empowers district court to impose sentence of 5 years’ imprisonment for an offence – The appellant charged with 10 separate counts of theft by false pretences.

Criminal procedure – sentence – pre-trial incarceration – not the only factor – delay caused by appellant having to appear in other jurisdiction on similar charges – learned magistrate did not err by giving no weight to this factor.

ORDER

1. The appeal is dismissed
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JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant is appealing against the sentence imposed by the learned magistrate in the district court in respect of only one count.

[2] The appellant was charged with 10 counts of theft by false pretences and he pleaded guilty to all. The learned magistrate convicted him of all counts, save count 7 counts/charges, on his mere plea of guilty in terms of section 112(1)(a). The appellant pleaded guilty to 7 and his statement in terms of s 112(1)(2) was presented to the court by his legal practitioner. He was sentenced to 5 years' imprisonment in respect of count 7. The remaining 9 counts were taken together for purposes of sentencing and he was sentenced to pay a fine of N\$4000 or failing payment to three years' imprisonment.

[3] The appellant is only appealing against the sentence of 5 years' imprisonment imposed in respect of count 7. The appellant noted his appeal in person. The grounds of appeal are not clear and specific but the court was however able to discern a few "grounds" of appeal.

[4] The first ground is that the court exceeded the magistrate court's jurisdiction by imposing a sentence of 5 years' imprisonment for count 7 and three years' imprisonment as an alternative sentence for the remaining counts. There is no merit in this ground as s 92 of the Magistrate's Court Act, 1944 (Act 32 of 1944) empowers the magistrate to impose a custodial sentence not exceeding 5 years' imprisonment for an offence. Each count constitutes a separate offence.

[5] The second ground which the court was able to discern was that the learned magistrate failed to consider that the appellant was in custody for 4 years' and 7 months awaiting trial. It is not apparent from the record that the learned magistrate considered this factor. The issue is to determine whether the learned magistrate erred in not taking this factor into consideration.

[6] The record reflects that the appellant had other pending cases and as correctly pointed out by Ms Amupolo, counsel for the respondent, his pre-trial incarceration was of his own doing. The record reflects that the appellant at times was not brought to court as he was detained in other districts pending the finalisation of the cases thus causing a delay in this court. The appellant, at the time of his arrest on 3 March 2012, was already convicted in the Ondangwa Magistrate's court of 3 counts of similar offences on 17 August 2010. He was given a fine. After his arrest in this matter, the appellant was convicted of 5 counts of fraud on 1 November 2013 (Outapi) and again on 20 May 2016 (Windhoek) when he was convicted of 11 counts of theft by false pretences. The appellant was sentenced in this matter on 14 October 2016. The appellant was thus held in custody not only in respect of this matter but also pending the other matters which were concluded before this matter. It was his propensity to commit similar crimes which resulted in his continued incarceration. In the circumstances of this case I cannot conclude that the learned magistrate erred when he failed to attach any weight to this factor.

[7] It is trite that an appeal court will not easily interfere with a sentence imposed by the trial court. The learned magistrate took into consideration the the appellant's "bible" of previous offences, his inability to reform after fines

and wholly suspended sentences were imposed in the previous convictions, the fact that he continued to commit further offence after his arrest. I am satisfied that the learned magistrate correctly concluded that custodial sentence is the only appropriate sentence.

[8] The nature of the offence he committed in count 7 clearly indicates that the accused was increasing the scope of his deceit. The appellant misrepresented to various complainants that he was: offering employment; or advancing loans; and selling a vehicle (count 7). He increased the amount he stole from complainants from N\$200 to N\$700 to N\$1250 and finally N\$25 000 in respect of count 7. It is only correct that the learned magistrate deemed it necessary to remove the appellant from society as he showed no indication that he wanted to be rehabilitated.

[9] The appellant failed to direct the court to any misdirection or irregularity during the sentencing by the learned magistrate. In the absence of any misdirection or irregularity on the part of the learned magistrate, this appeal stands to be dismissed

[10] In the result the following order is made;

1. The appeal is dismissed.

M A TOMMASI
JUDGE

JUDGE
H C JANUARY

Appearances:

For the Appellant:

Mr lipinge

Of Oluno Correctional Facility

For the Respondent:

Adv Amupolo

Of Office of the Prosecutor-

General