



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI**

**APPEAL JUDGMENT**

CASE NO: HC-NLD-CRI-APP-CAL-2018/00017

In the matter between:

**WILBARD IIPINGE**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Iipinge v S* (HC-NLD-CRI-APP-CAL-2018/00017) [2018] NAHCNLD 87 (11 September 2018)

**Coram:** TOMMASI J and JANUARY J,

**Heard:** 05 May 2018

**Delivered:** 11 September 2018

**Flynote:** Criminal Procedure – Appeal – Sentence – Fraud – Position of trust – Magistrate considered personal circumstances – Balanced mitigating factors against aggravating circumstances – Sentence confirmed.

**Summary:** The appellant was convicted and sentenced to 12 months imprisonment for fraud. He is appealing against the sentence and prays for a fine. A fine would trivialize the seriousness of the crime. Although the appellant is a first offender, he was in a position of trust. There is no merit in the appeal. Appeal dismissed.

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**ORDER**

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The appeal is dismissed.

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**APPEAL JUDGMENT**

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JANUARY J (TOMMASI J concurring):

[1] The appellant in this matter pleaded guilty on a count of fraud. The allegation was; '... that he upon or about the 13 day of May 2016 at or near Penny Pinchers-Ongwediva in the district of Oshakati did unlawfully, falsely and with intent to defraud, give, act and pretend to Mwafufya Nathanael that he is authorized by Posh Investment CC/ Israel Hauwanga to return 7 boards [wooden] in exchange for cash and did then and there by means of the said false pretence induce the said Mwafufya Nathanael to issue a credit note of N\$4691.57 to the actual or potential loss and prejudice of Israel Dollo Hauwanga whereas in truth and in fact when the said accused so gave out and pretended as aforesaid, He well knew that he was not authorized by Israel Dollo Hauwanga to return the boards in exchange for cash and thus the accused committed the crime of Fraud.'

[2] The court applied section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 (the CPA), convicted and sentenced the appellant to 12 months imprisonment. He is now appealing against sentence. The appellant filed his notice of appeal on time. He is a self-actor. Mr Gaweseb is representing the respondent.

[3] The grounds of appeal are; 'a) The honourable magistrate failed to take in account my personal circumstances; b) the honourable magistrate failed to take into consideration my plea for being granted an option for fine (sic) in this sentence; c) the honourable magistrate over emphasized the seriousness of the case and the interest of society. Although the amount involved is not substantial and I refunded the complainant'.

[4] Mr Gaweseb opposed the appeal and submitted that there are no merits in it. He submitted that the appellant already raised his personal circumstances in the court below; that the magistrate appropriately considered it and that the aggravating circumstances outweighs the mitigating factors.

[5] The appellant prayed for a fine in the court below and is also asking for a fine in this court. He is a first offender; tendered a guilty plea; he is a father of school going children one of whom is a student at the University of Namibia; he has a vocational training certificate and he has to support his children.

[6] The learned magistrate indeed considered the abovementioned personal circumstances and balanced them against the seriousness of the crime. The appellant committed the crime when he was in a position of trust. The crime was premeditated and is prevalent. Imposing a fine would trivialize the crime.

[7] It is trite law that 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;

- a. when there was a material irregularity; or
- b. a material misdirection on the facts or on the law; or
- c. where the sentence was startlingly inappropriate;
- d. or induced a sense of shock; or
- e. 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;
- f. irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.<sup>1</sup>

[8] I find that there are no merits in the appeal. It consequently stands to be dismissed.

[9] In the result:

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<sup>1</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 364 G.

The appeal is dismissed.

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H C JANUARY  
JUDGE

I agree

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M A TOMMASI  
JUDGE

Appearances:

For the Appellant:

Mr W lipinge

Of Oluno Correctional Facility, Ondangwa

For the Respondent:

Mr T Gaweseb

Of Office of the Prosecutor-General, Oshakati