

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHER LOCAL DIVISION  
HELD AT OSHAKATI  
APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00052

In the matter between:

**AMOS AMUPOLO**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Amupolo v S* (HC-NLD-CRI-APP-CAL-2018/00052) [2019]  
NAHCNLD 33 (26 March 2019)

**Coram:** JANUARY J *et* SALIONGA J

**Heard:** 26 February 2019

**Delivered:** 26 March 2019

**Flynote:** Criminal Procedure — Sentence — Appeal against — Interference by Court of appeal — Such interference only justified where sentence vitiated by irregularity or misdirection — Sentence essentially falling within discretion of trial court — Court to balance purpose of punishment with the personal circumstances, the nature

of the offence and interest of society — No misdirection on the exercise of judicial function.

**Summary:** The appellant together with his co-accused were convicted of housebreaking with intent to steal and theft. Appellant was sentenced to 20 months imprisonment. Dissatisfied with the sentence imposed, he noted an appeal on grounds that the court did not extract information from the accused/appellant that could have assisted the unrepresented accused/appellant in mitigation before sentence and the sentence imposed is shockingly inappropriate, that no reasonable court of first instance would have imposed it. That the magistrate overemphasised the seriousness and prevalence of the offence at the expense of personal circumstances of the appellant.

It is a settled rule of practice that punishment falls within the discretion of the trial court. As long as that discretion is judicially, properly or reasonably exercised, an appellate court ought not to interfere with the sentence imposed. The discretion may be said not to have been judicially exercised if the sentence is vitiated by an irregularity or misdirection. In this appeal there is no such misdirection or irregularity. The appeal is dismissed.

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### **ORDER**

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1. Appeal against the sentence is dismissed.
  2. Bail is cancelled and appellant is remanded in custody to serve his sentence.
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### **APPEAL JUDGMENT**

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SALIONGA J (JANUARY J concurring):

[1] This is an appeal where appellant was charged with his co-accused in the district court, sitting at Oshakati on a charge of housebreaking with intent to steal and theft. He pleaded guilty, was convicted and sentenced to 20 months imprisonment.

[2] Dissatisfied with a sentence imposed, he lodged the notice of appeal within the prescribed period. In the meantime, the matter was confirmed on review and the certificate is hereby withdrawn.

[3] The appellant during the trial appeared in person and Ms Amupolo now prosecutes the appeal. Mr Andreas appears for the State.

[4] The grounds of appeal are summarised as follows:

(a) The learned magistrate erred in fact and / or in law in that she failed to aid an unrepresented accused/appellant in mitigation. In other words she failed to extract information from the appellant which would have assisted the court in coming to an appropriate sentence.

(b) The magistrate erred in fact and /or law by not taking into account the personal circumstances of the appellant more specifically that the appellant is a youthful offender who was in grade nine at the time of the commission of the offence.

(c) That she overemphasised the seriousness of the offence at the expense of the appellant and imposed a sentence that induces a sense of shock, that no reasonable court of first instance would have imposed.

[5] It is trite law that the power of the appeal court to interfere with the sentence imposed by a court *a quo* is limited as the discretion lies with a trial court. These limited instances on which the court of appeal is entitled to interfere with the discretion of a trial court were set out in *S v Tjiho* (1991 NR 361 (HC)); that the appeal court can only

interfere where there exists a misdirection or irregularity or where the sentence imposed is shockingly inappropriate or induces a sense of shock or was such that a striking disparity existed between the sentence imposed by the trial court and one which the court of appeal would have imposed had it sat in first instance.

[6] The court hearing the appeal should be careful not to erode such discretion and should only interfere if satisfied that the trial court's discretion was not exercised judicially or properly (*S v Ndikwetepo & others* 1993 NR 319 (SC)). As a matter of fact or practice, the court of appeal should be slow to overturn the sentence of the trial court as punishment pre-eminently falls within its discretion.

[7] Counsel for the appellant submitted that in casu the personal information of the appellant is very scant. It is also not known whether or not the appellant was or had a support structure at home who resides with, where his parents are and no reasons for sentence were provided by the magistrate during her sentencing of the appellant.

[8] She went on to submit that it is not known what factors were taken into consideration and how much weight was placed on those factors in sentencing an 18 year old appellant. Further counsel for the appellant submitted that the magistrate's mere lip service in her reasons for sentence could not be taken to mean that she indeed considered any personal circumstances. There was insufficient personal circumstances on record. The sentence is shocking and no reasonable court would have imposed it. In her opinion, a sentence in terms of s 290(3) of the Criminal Procedure Act, 51 of 1977 would have been appropriate in these circumstances.

[9] Counsel for the respondent on the other hand echoed with the appellant's argument that the courts are duty bound to assist an unrepresented accused during mitigation to elicit as much information as possible that can assist the court in deciding or arriving at an appropriate sentence.

[10] He, however submitted that it is notable from the record that the rights to mitigation were fully explained to the appellant. It is also evident from the record that the learned magistrate assisted the appellant by questioning him as to where he schooled and what grade he was in. Counsel submitted that the appeal be dismissed.

[11] From the judgment on sentence that the trial magistrate explained the appellant's rights to mitigation fully and he understood as displayed on page 35 of the record. The magistrate further gave detailed reasons after she had received the notice of appeal. The reasons are sufficient to convince this court that she considered, the personal circumstances, the seriousness of the offence, prevalence and the fact that the punishment must fit the offender, crime and must be fair to society as was held in *S v Zinn* 1969 (2) SA 537 (A).

[12] In *S v Bezeidenhout & others* case no 58/1999 unreported judgment delivered on 17 May 2001, the court set out factors to be considered when imposing a sentence on a charge of house breaking with intent to steal and theft. These are, the excessive force used to gain entrance, motive of greed, the value of goods stolen and prevalence of the offence.

[13] In the instant case the appellant and his co-accused used excessive force to gain entry into complainants' house by breaking the padlock and the items stolen valued N\$1300 and were not necessities but luxuries. The offence is prevalent in the district. In other words the aforesaid factors were all met warranting a custodial sentence to be imposed in this case. We are thus unable to find that a sentence of 20 months' imprisonment imposed is so manifestly excessive that no reasonable court sitting as a court of first instance would have imposed it. In light of the above we are satisfied that the trial court in sentencing the appellant, exercised its discretion properly and there is no basis in law for this court to interfere with the sentence imposed.

[14] In the result:

1. Appeal against the sentence is dismissed.

2. Bail is cancelled and appellant is remanded in custody to serve his sentence.

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J T SALIONGA  
JUDGE

I agree

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H C JANUARY  
JUDGE

## APPEARANCES:

APPELLANT:

Ms M Amupolo  
Of Amupolo & Co, Ongwediva

RESPONDENT:

Mr J Andreas  
Of the Office of the Prosecutor-General, Oshakati.